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THE DECAY OF THE PRINCIPLES OF EQUITY IN THE CODE STATES.

Not long since in a conversation with a *nisi prius* judge of one of our large cities, who is recognized as an able chancellor, in response to the question whether or not the code had developed equity practice, he remarked that: "The principles of equity were not only not being developed by the code practice, but were, in fact, not understood by the bar of that city, with but a very few exceptions." One of the ablest chancellors of one of our large states, where the code practice is established, remarked, in answer to the same question, "not only is the bar deplorably lacking in a knowledge of equitable principles and practices, but that there was not a judge on the supreme bench of that state, who could be called a good chancellor." An ex-judge of a supreme court remarked to the writer that, David Dudley Field, the author of the New York code, most keenly felt the results of the course of practice under it which tended to destroy the very object he had hoped to attain, by putting it into practical use. His code was drafted from Bacon's code, and he had hoped to see it interpreted by the use of the maxims, as was intended by Bacon. But the truth is, that even in states where equity practice is separate from that of the common law, but few good chancery lawyers and great chancery judges have been developed, so, it is not at all remarkable, that a code has wholly failed in reaching the objects which inspired its creation. Coke and Blackstone were responsible for causing equity to be regarded as auxiliary to the common law. The administration of English jurisprudence was brought to America, and put into practice as Coke had directed it in England; it breathed the rigid spirit of the common law. The result was that equity was never able, under the old system, to become more than auxiliary to the common law. Great chancellors, like Story, Kent and Field, thoroughly understood the spirit of equity and the power it got being interpreted by the maxims, which were the very spirit of equity. Bacon saw what a wonderful system of jurisprudence was possible with the maxims as the basis of procedure and construction.

The greatest judges of all the ages were such because of their remarkability in construction. Their ability in construction is plainly attributable to their comprehensive knowledge of the maxims and their relationships. These matters were much better comprehended by our fathers. The force and effect of great rules of construction and ability to apply them, has almost become a lost art, in the presence of the deluge of case law, with which the country is fairly flooded and afflicted. Enterprising book houses have been urging the last case as the great thing for the lawyer and the judge, and these lawyers and judges have been learning nothing of rules of construction. Is it a wonder then, that they know nothing of equity jurisprudence and have not caught the inspiring influence of its great tones? No judge can become well rounded till he thoroughly understands the depth and breadth of equity, and a lawyer who understands it, has a great advantage over one who does not. That they do not understand equity is freely admitted by many of the code state lawyers. The decisions of the judges in code states show how inadequately they have grasped equitable principles in the great majority of instances, which many of them are loud misfits. Only a short time since, an opinion of a supreme judge of a code state went so far as to say that, "it was not his business to look through the whole record of an equity case in order to determine whether the court below had committed error, and regarded the findings of the court below as to facts as conclusive on him. If this was not carrying the principles of common law into equity with a vengeance, what was it? But this is merely an instance of the many, which show how equitable principles are submerged by the spirit of the common law. It is a matter of the deepest regret that things are so going, for with it goes the redeeming glory of our jurisprudence. The due process of law comprehended by the constitution included equity. In many states we have come to see the prophet's words verified in that, "truth is thrown down in the streets and equity cannot enter." No wonder David Dudley Field grieved at the manner of the interpretation of the New York

code, which so many states have adopted and misunderstood, as did the New York courts. One hope lies in the adoption by the states of the English judicature act as a substitute for their own codes and the intepretation of it by English judges. England has done Bacon and David Dudley Field honor in that act and the interpretation thereof. Why should not America honor England in adopting it?

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW—VERDICT OF "RECEIVING STOLEN GOODS" NOT RESPONSIVE TO AN INDICTMENT FOR THAT OFFENSE.—An indictment for the offense of receiving stolen goods always charges that the said goods were received "with knowledge that the same were stolen." Indeed, such a charge is essential to establish an offense under the laws of any state, as no state makes it an offense to receive stolen goods innocently. With this understanding of the situation it is not difficult to see the point of the recent decision of the Supreme Court of Florida in the case of Harris v. State, 43 So. Rep. 311, where the court held that under an indictment for receiving stolen goods, knowing same to have been stolen, a verdict of "guilty of receiving stolen goods" is bad, as not responsive to the indictment. The court in discussing the case, said: "The verdict of the jury in this case is not responsive to the charge and not consistent therewith, and does not find anything that is necessary to enable the court to render judgment. It is evident that the defendant was not convicted on the first count of the information. The jury attempted to find him guilty on the second count. The second count charged the defendant with the crime of buying, receiving, and aiding in the concealment of stolen property, knowing the same to have been stolen, as provided in section 3304, Gen. St. 1906, which was section 2451, Rev. St. 1892. An essential element of this crime is the knowledge on the part of the party charged that the property received was stolen. The essential element of knowledge was not included in the verdict rendered by the jury in this case. The jury did not find the defendant guilty of having this knowledge that the goods received by him were stolen. The jury found the defendant guilty of receiving stolen goods. There is no such crime known to the laws of Florida. It is no offense to receive stolen goods, unless the person so receiving them knows them to have been stolen. The court could not legally punish the defendant for the offense found in the verdict. The verdict is a nullity. No legal judgment or sentence can be predicated upon it. 1 Bishop's New Crim. Proc., § 1005; State v. Whitaker, 89 N. Car. 472; O'Connell v. State, 55 Ga. 191; Dreyer v. State, 11 Tex. App. 631; State v. Burdon, 38 La. Ann. 357; Miller v. People, 25 Hun (N. Y.), 473; Hogan v. State, 42 Fla. 562, 28 So. Rep. 763. The court erred when it refused to arrest the judgment. Where the arrest of judgment is because the verdict is a nullity, or so defective that no judgment can be rendered upon it, a new trial will be ordered. Lovett v. State, 33 Fla. 389, 13 So. Rep. 837; 1 Bishop's New Crim. Proc., § 1288."

THE TOOL CASE OF COLORADO — RIGHT OF APPELLATE TRIBUNAL TO ASSUME CHARGE OF ELECTIONS BY WRIT OF INJUNCTION.

No adequate discussion of the series of decisions,[1] orders and proceedings, which will be known in Colorado's history as "The Tool Case," is possible, without a brief introductory reference to the disgraceful election struggles in which they were conceived and born.

Election Frauds in Colorado.—For many years prior to the fall election of 1904—and recent events unfortunately convey the impression that the end is not yet—the state of Colorado carried the heavy burden and exhibited on her escutcheon the indelible stain of peculiarly atrocious election frauds. Language can do but scant justice to the election practices, which plainly tended to the overthrow in this state of popular and representative government. The first genuine climax of these scandals was reached in the public declaration of a Colorado congressman, in the house of representatives at Washington, in the spring of 1903, to the effect, that the frauds, by which his election to congress had been obtained, were of so apparent, gross and indefensible a nature, that, on their account, he voluntarily relinquished his seat. As a result of this disclosure, public opinion was not so shocked as it otherwise might have been by radical action through the courts in the succeeding general election, and when in the fall of 1904, in response to the petition of the attorney general of Colorado, the supreme court issued a general injunctive order for the supervision of the election. This action, which was conceded to be, by many who urged it, unprecedented in judicial annals, is now before us for legal and constitutional review, and, making all allowance for the revolutionary conditions preceding it, which have been frankly stated, and which no honest man can too strongly condemn, it ought to be said, at the outset, that it is the purpose of these remarks to prove, that the Tool case was judicial revolution,—as bad, legally speaking, in method, and, generally speaking, as dangerous in principle, as the preceding revolutionary practices of election criminals.

The Alleged Situation and the Relief Sought in 1904.—Considering, in some detail, the bill in the original Tool case, filed on the relation of

[1] People v. Tool, 86 Pac. Rep. 224, 229, 231; People v. District Court, 86 Pac. Rep. 87.

the attorney-general and the governor of Colorado, who at the time was also a candidate for re-election, we find that it contained a partial review of the election frauds which have been referred to, and the following, among other allegations, in substance: that there existed a conspiracy in the city and county of Denver, of practically all the election judges, a majority of the election commissioners, the sheriff, the fire and police board, the chief of police, the chief of the fire department, and chairmen of the democratic committees, to prevent a fair and open election; that, as a part of such conspiracy, thousands of names were fraudulently registered in Denver to be voted on by impersonators; that the intimidation of such voters was to be attempted on election day; that frauds were contemplated, both in the casting and counting of ballots, in the exclusion of the lawful watchers and challengers from the count and the making up of the returns; that should these practices be attempted, considering the intense and partisan temper of the public, riot and bloodshed might occur, and the irreparable wrong and injury therefore threatened the people of the state of Colorado. The prayer of the complaint was for an injunction to restrain the illegal acts contemplated, and for affirmative relief through the appointment of two watchers in each of the several precincts of the city and county of Denver, to represent the supreme court, and to observe the conduct of the election.

Action Taken by the Supreme Court.—In brief, the bill besought the supreme court to supervise an election by means of an injunction against threatened crime in the name of the sovereign state of Colorado. In response to the application, the prayer for relief was granted, and the court issued an injunction directed to the defendants named in the bill, and alleged to be parties to the conspiracy, enjoining them to conduct the election honestly, and in accordance with the election laws. As stated by the supreme court,[2] "the general purpose and scope of the relief demanded," and therefore attempted to be granted, "was a judicial enforcement of the statutes relating to elections so as to prevent the perpetration" of frauds.

The injunction order, itself, elaborately specified the statutory duties which the election officials were instructed to perform, and recited that, in order more fully to guard the purity of the election, the court would appoint, as prayed, two persons to act as supreme court watchers in each precinct in Denver on election day, who should be permitted free access to the polling places during the day, throughout the count, and up to and including the sealing of the ballot boxes, with access to all books and lists for the purpose of identifying voters and preventing fraud. In addition, although the election statutes put discretionary power in the hands of the election judges to appoint the clerks of election of opposite political faith, in order to effectuate the purpose of its jurisdiction the supreme court, in its injunctive order, required the judges to appoint as one election clerk a person to be named by the republican minority member of the election commission. Both of these requirements overrodethe provisions of the election statutes of Colorado.[3]

Such was the situation on election day, 1904. Following the election, the parties who obtained the injunction, representing to the court the occurrence of election crimes, besought the court to inquire into violations of its injunctive order, whereupon the court proceeded to the extended trial of contempt cases. Having taken jurisdiction of the case before election, the court then announced, in substance, that, in the exercise of reserved jurisdiction, it would not stop with the punishment of contempt, but would retain jurisdiction for the purpose of effectuating the objects of its original injunction.[4] Among other things, the court required the election commission, acting as a canvassing board, not to complete its canvass or issue certificates of election to any candidates until further order of the court, carefully excepting therefrom, however—evidently to avoid any constitutional question in the federal courts—the returns affecting presidential and vice-presidential electors, and candidates for congress. It required the same commission not to permit the judges of election to change their official certificates as to the result in any particular precinct, regardless of the statute permitting judges of election to correct clerical mistakes.[5] It appointed supreme court watchers to watch all election records in the hands of the election commission. It ordered the opening of ballot boxes in the presence of the court, and the examination of the ballots by handwriting experts. More important than all else, and as a culmination of its supervision of the proceedings, it ordered the election commission to exclude the returns in some ten specified precincts, and to issue certificates of election to candidates voted on in the general election, precisely as if the ten precincts referred to had not actually been voted in.[6]

Political Consequences.—As a result of such exclusion, republican rather than democratic candidates for county offices were elected in Denver on the face of the returns, and were subsequently seated. That exclusion also permitted and assisted a similar ensuing change in the political complexion of the state senate of Colorado. As additional results, two republican appointees to the supreme bench were confirmed, instead of possible democratic appointees, and a contest,

[2] People v. Tool, 86 Pac. Rep. 226.

[3] Colo. Session Laws, 1891, sec. 24, pp. 155-156. Vol. 1, Mills' Ann. Stat. of Colo., sec. 1598.

[4] See People v. Tool, 86 Pac. Rep. 229, 231.

[5] See People v. Tool, 86 Pac. Rep. 231.

[6] See People v. Tool, 86 Pac. Rep. 229, 230. (The foregoing reference to the order of the court is a partial summary of the actual written orders issued from time to time).

inaugurated over the governorship of the state, was, undoubtedly, greatly influenced in its final determination. In this connection it should also be noted, among results of the supreme court's action, that, in the exclusion of the ten precincts referred to, no account was taken by the court of the legal votes actually cast in any of such precincts.

A summary of the action of the supreme court in the Tool case shows, therefore, the following situation: First, the issuance of an injunction against anticipated crime in purely political matters; second, the exclusive control by the court, regardless of election statutes, of the discretion, as well as legal duties, of executive and administrative officers, and the reversal, without compliance with any contest statutes, of the *prima facie* outcome of a popular election by means of the exclusion of whole precincts of votes, legal and illegal votes being indiscriminately bundled out together. In other words, the judiciary entered the realm, both of executive and legislative functions—adding, to those already in the election statutes, new, multiplied and far-reaching penalties for offenses, and controlling and defining the affirmative previously optional action of administrative agents.

What The Tool Case Decided.—It becomes important to consider the legal grounds on which the supreme court sought to justify these remakable results. They are stated in four reported cases, three of them bearing the common title of The People v. Tool,[7] the fourth, a more recent utterance of the court being known as The People v. The District Court.[8] In the first three decisions the supreme court announced the following main doctrines in support of its action: First. The state in its sovereign capacity, through its attorney general, may maintain a bill in equity, alleging aconspiracy for acts tending to pollute the ballot box, notwithstanding the fact that the acts charged are criminal offenses. Second. Under the constitution of Colorado, Article VI, Section 3, the supreme court has jurisdiction of such a suit, begun by the state on the relation of the attorney general. Third. The court's jurisdiction in a suit to enjoin a fraudulent conspiracy to prevent an election includes remedial orders as well as the power to punish for contempt; and it is no objection to a motion to exclude election precincts, wherein it is impossible to determine the number of votes fraudulently cast and in some cases counted, that such exclusion will disfranchise voters, because such exclusion will not interfere with subsequent election contests. The propositions stated appear to be meant to announce, or grow out of the ordinary jurisdiction of courts of equity, and much of the language of the supreme court in the original Tool case seems to sanction this view. However, there are intimations in that decision of a more extensive claim of authority for the action taken, and such intimations have recently been elaborated into a judicial interpretation or annotation of the original decision in the Tool case by the supreme court itself, which it is impossible to disregard in any adequate discussion of that case. In explaining, in July of this year, the reasons for its action in originally attempting to supervise the election of 1904, the supreme court of Colorado has unequivocally gone on record in favor of the following proposition (which will be numbered in sequence with the foregoing): Fourth. That the right of the supreme court to supervise and control elections arises from its exclusive right to issue the high prerogative writs of the common law, which, anciently, were the instruments of the English King[9]—a right not possessed by the District Court of Colorado, and only to be exercised by the supreme court in proceedings involving the sovereignty of the state, its prerogatives or franchises, or the liberties of its citizens. It is submitted that in order to sustain the position of the supreme court in the Tool case its defenders must show: 1. Either that the court's claim of exclusive high prerogative original jurisdiction to control elections, based on certain alleged inherent English kingly prerogatives, is well founded, or 2. That the decision may be partially sustained on the broad ground of general equitable principles—this latter view being that the court's exercise of jurisdiction was right, although the reasons given therefor are wrong. Let us consider these propositions in their varying phases.

The Constitutional View of Royal Prerogatives.—The essential theory of the Tool case, is that the Supreme Court of Colorado, through its enumerated constitutional writs, may judicially enforce election or other statutes, and even directly enjoin crime by virtue of certain alleged exclusive sovereign prerogatives. On this subject our supreme court has quoted with approval the language in a Wisconsin case, Attorney General v. Blossom,[10] reading as follows: "This class of writs (given to the supreme court by enumeration in the constitution), it would seem, appertain to and are peculiarly instruments of the sovereign power acting through its appropriate department; prerogatives of sovereignty represented in England by the king and in this country by the people in their corporate character, or in other words, the state, and from their peculiar character, functions and objects appertain to and appropriately belong to the supreme judicial tribunal of the state. Being prerogative writs they do not pertain to courts of inferior jurisdiction."

The General American Doctrine.—That the doctrine just stated, constitutionally examined, is wholly unsound and should be repudiated by every lover of free institutions is evident from a review of the

[7] 86 Pac. Rep., respectively at pages 224, 229 and 231.

[8] 86 Pac. Rep. 87.

[9] People v. District Court, 86 Pac. Rep. 87, 90.

[10] 1 Wis. 317, 320.

theory and expression of written constitutions. Judge Cooley, whose authoritative right to speak on the subject will not be doubted, in his "Constitutional Limitations," lays down doctrines which are fundamental under our system of government, as follows: "The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. The people of the union created a national constitution and conferred upon it powers of sovereignty over certain subjects, and the people of each state created a state government to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. By the constitution which they established, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the state, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.[11] * * * A written constitution is in every instance a limitation upon the powers of government in the hands of agents, for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition.[12] It need not be said that these doctrines did not originate with Judge Cooley. They are familiar to every student of constitutional law. Strictly speaking, there are no inherent powers in courts in a land of written constitutions. Chief Justice Marshall, in the Bollman case,[13] expressed the same proposition, as follows: "Courts which originated in the common law possess a jurisdiction which must be regulated by common law until some statute shall change their established principles, but courts which are created by written law and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

In Colorado the same doctrines have been often and well expressed, an exceptionally clear instance being the case of Blitz v. Moran,[14] wherein it was said: "Our courts have no prescriptive powers; their powers are derived solely from the constitution and the statutes, and their inherent powers are those only which are necessary to render their express powers effective and to enable them to exercise their jurisdiction."

The Colorado Supreme Court.—These elementary constitutional statements can only mean that if any exclusive high prerogative jurisdiction of royal origin exists in our supreme court, its grant must be found in the Colorado constitution. The idea is additionally emphasized by the reservations in our bill of rights. Section 1, article II, of the constitution, with its introduction, reads as follows: "We declare * * * that all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." And section 23 of the same article again repeats the unmistakable principle in this way: "The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people."

It is indispensable, then, to consider the constitutional grants of jurisdiction to our supreme court. The clauses dealing with the jurisdiction of the supreme court are found in article VI. of the constitution, and reads as follows: "Section 2. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law." "Section 3. It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, and other original and remedial writs, with authority to hear and determine the same. * * *"

Reasonably read, what is the significance of these clauses? Was it not plainly the purpose of the framers of the constitution, in creating the supreme court, to make it primarily and essentially a court of review and supervision, and only incidentally and in exceptional cases (where through crises of one sort or another or unforeseen contingencies, as in matters pre-eminently *publici juris*, the delays of ordinary appeal are foolish, impracticable or dangerous) a court of original jurisdiction? Two differing answers to that question are hardly conceivable. Nowhere in the constitution will there be found the slightest intimation either that the supreme court has exclusive jurisdiction to issue the writs enumerated in section 3, or that the jurisdiction to issue them is in any degree analogous to the ancient claims of English sovereigns to high prerogative privileges. Nor should the fact that the writs (except injunction) enumerated in the constitution are those which are historically called "prerogative" be permitted to cloud the situation, for all of the writs historically known as "prerogative" are of course today so termed as a proper and convenient means of designation, and are in general use in all courts of general original jurisdiction. The writ of injunction which was employed in the Tool case, as every lawyer knows, was a chancery writ in its origin and never, except by courtesy or analogy, was in any sense prerogative. If the constitutional argument in favor of the sovereign prerogatives hidden within so-called "prerogative writs" is weak, how much weaker must the contention be when attempted to be applied, as in the Tool case, to a writ only "prerogative" by implication?

The Colorado District Courts.—That what has been stated is the correct view of the constitutional intent becomes yet more evident from a reading of section 11 of article VI. of the consti-

[11] *Ib.* (th Ed.), 39.
[12] *Id.* p. 49.
[13] *Ex parte* Bollman, 4 Cranch, 75, 93.
[14] 17 Colo. App. 253, 261. See also Wheeler v. North Colo. I. Co., 9 Colo. 248, 249.

tution, wherein the jurisdiction of our district court is concisely defined. It is there stated that: "The district courts shall have original jurisdiction of all causes, both at law and in equity." Within the bounds of this simple but direct and all-embracing language, lawyers will look in vain for any limitation on the original jurisdiction of our district courts. If the proceedings in the Tool case arose out of a cause either at law or in equity, it follows inevitably that our district court has jurisdiction of such causes. For the supreme court successfully to deny this, it must cite some other prohibitive or, perhaps, modifying constitutional clause as, for instance, the grant of probate jurisdiction to our county courts. No such clause exists in favor of the supreme court. The very statement of the proposition is conclusive. It would be impossible to add language to the constitutional grant to the district courts which would enlarge their jurisdiction. It is ridiculous to treat the word "all" as a word of limitation, and the only possible theory upon which the supreme court can uphold its latest interpretation of the legal basis for its action in the Tool case is by the proposition, which, unfortunately, runs through its extraordinary decision in the case of the People v. The District Court, viz.: that the proceedings in the Tool case were not in a cause "at law or in equity," but that as a matter of fact the supreme court in those proceedings was exercising a power above the written law which was exclusive, without accountability or responsibility to the people and for the abuse of which there is no legal redress.

No lawyer, holding fast to the indisputable principles announced by Judge Cooley and Chief Justice Marshall, can for a moment concede, much less understand, such a doctrine. Its very announcement condemns it. Until the supreme court's recent interpretation of the Tool case, lawyers generally did not suppose any court could seriously assert it, and in this view they were justified by numerous prior announcements of the supreme court itself. The very rules of the supreme court now in force recognize the right of our district courts to issue "prerogative" writs, and again and again, in cases in the Colorado reports, the concurrent right of the district court to issue the so-called "prerogative" writs has been conceded, sustained, and even urged on our district courts by our highest court.[15]

It would seem that the foregoing statement would carry conviction to any unbiased mind, but if further evidence is desired that the supreme court is devoid of high and exclusive prerogative jurisdiction in election or any other cases, certainly any rational doubt can be dispelled. For instance, it was admitted in the original Tool case decision that the proceedings were in "a civil action,"[16] and were "by a suit in equity,"[17] and that it was "a court of equity,"[18] the powers of which had been invoked in a suit.[19] In view of these announcements what court or lawyer will take the inconsistent position that the original jurisdiction of our district courts over all causes at law and in equity specifically granted by the constitution does not include the consideration of such proceedings when properly instituted? The supreme court in its most recent interpretation of the Tool case suggests[20] that the distinction between its powers and those of the district court rests on the fact that the constitution gives the supreme court the "power" to issue certain writs, while the district courts are simply given "jurisdiction" of all causes in law and equity. As a matter of fact, if necessary, it could be shown that text writers and courts, without observable dissent, are agreed that "power" and "jurisdiction" are interchangeable words, and that power in the judicial sense is not a broader word than jurisdiction, both being substantially defined as the right to hear and determine a cause between parties to a suit before the court.

The Wisconsin and Other Cases.—As a corollary to what has been said, it is manifest that, if under any other written constitutions than that of Colorado a grant of exclusive prerogative jurisdiction be made to any court, that fact, if it be a fact, can have no result in Colorado, nor can any legal precedent elsewhere, under different constitutional provisions, either bind or guide us here. But it is interesting to observe that even under other constitutional provisions than our own, practically all cases, to which our supreme court turns as authorities for its decisions, are opposed to the asserted doctrine. The Wisconsin

[15] People v. Londoner, 13 Colo. 303; *In re* Rogers, 14 Colo. 18, 20; The Greenwood Co. v. Routt, 17 Colo. 156, 159, 170; People v. A. S. & R. Co., 30 Colo. 275, 276.

[16] 86 Pac. Rep. 227.

[17] *Ib.* p. 228.

[18] *Ib.* p. 227.

[19] That such was the view, at the beginning of the Tool case, of the attorney general and his associate counsel, is shown by the following, among other allegations in the original bill (p. 10): "This is a case and an action in which this honorable court, the highest and most respected tribunal in this state, should extend the equity arm of the court for the prevention of fraud at said election and the maintenance of the rights guaranteed by the constitution and statutes of the state: That similar petitions to this have been, prior to the previous elections in said city and county of Denver, presented by other petitioners to the district court within and for said city and county of Denver, and that although such similar petitions have been granted and similar writs of injunction, as prayed for herein, issued, yet said writs of injunction have often been violated: that your petitioner believes that if the writ as prayed for issues out of this court that it will be respected and obeyed and will have far greater weight and authority by reason of the fact that it is issued out of and by order of the highest judicial tribunal of the state, and that for this reason, among others, this court ought to take original jurisdiction of this case."

[20] People v. District Court, 86 Pac. Rep. 89.

cases are the main bulwark for the contention of our court. No one of them will be found to be a precedent for judicial supervision of an election. It is true there is language in the early Blossom case[21] that appears broad enough possibly to sanction the assertion of a right in the Wisconsin Supreme Court to do anything at any time. Nevertheless, it may be confidently stated, after a careful revew of the Wisconsin cases as a whole, that the expositions by the Wisconsin Supreme Court of the effect of the Wisconsin constitution show its views to be radically different from and hostile to the position of our court. That, contrary to the Colorado decision, the circuit courts of Wisconsin (corresponding to our district courts) may employ all writs, "prerogative," or otherwise, is apparent from any accurate reading of the cases. This was announced in what has been termed "the pioneer" decision of Chief Justice Ryan (which our supreme court cites with much approval) in these words: "The writs are given to the circuit courts as the appurtenances to their original jurisdiction; to this court for jurisdiction. Those courts take the writs with unlimited original jurisdiction of them, because they have otherwise general original jurisdiction. Other original jurisdiction is prohibited to this court, and the jurisdiction given by the writs is essentially a limited one. Those courts take the prerogative writs as part of their general jurisdiction with power to put them to all proper uses. This court takes the prerogative writs for prerogative jurisdiction, with power to put them only to prerogative uses proper."[22]

No language could more clearly express the most liberal possible construction of the significance of the grants respective to our supreme and district courts in the Colorado constitution, viz.: that our district courts may use the so-called "prerogative" writs for all lawful purposes, and that the higher court, being primarily appellate, is only to employ them when, in its judicial discretion, a matter of very considerable public moment (of which our district court also has jurisdiction), calls for a speedier or higher determination, without the delay incident to review. This, it is submitted, is what Chief Justice Ryan both said and meant to say, and what the later Wisconsin cases confirm.[23] It is also and equally important to note that, unlike our supreme court (which, as shown, not looking for other lawful grounds for its action than the sovereignty of the state and the welfare of its citizens, undertook to enjoin an election, in which only political rights were involved), the Wisconsin courts have always apparently upheld the correct legal view, that lawful grounds for the court's action must exist, in addition to and apart from the standards recited. In other words, the Wisconsin Supreme Court treats the sovereignty of the state or the public welfare merely as a criterion for the exercise of its original jurisdiction.[24] The jurisdiction itself must otherwise exist. The Wisconsin decisions[25] indicate that if their supreme court had held, as ours has held recently, that there is a "want of power"[26] in our district courts to supervise elections of any character affecting the public only, then the Wisconsin Supreme Court would not have felt justified in supervising the election merely on the grounds advanced by the Colorado Supreme Court, that the sovereignty of the state or the welfare of its citizens was involved. This fair interpretation of the proper field, for the use by a supreme court of the so-called "prerogative" writs, must appeal to every unprejudiced lawyer, and simply turns us back to the constitutional plan for popular elections, and to the ordinary precedents of equity, which are known to be opposed to the judicial supervision and regulation of elections. The supreme court having admitted that, under ordinary equity principles, it could not enjoin elections, it becomes apparent that, unless its exclusive constitutional authority to act arbitrarily is upheld, its own decision is conclusive authority against its own action. So, without taking the time to review them in detail, it may be said that the other decisions relied on by the Colorado Supreme Court, most of which look to the Wisconsin cases for leading, are in the main distinguishable, and in their reasonable effect are authorities against its view.

The Historical View of Royal Prerogatives.—A very important refutation of the view to which the Colorado Supreme Court is driven, that its jurisdiction is equivalent to the exercise of prerogatives under the ancient English constitution by the kings of England, either personally or through the courts of kings bench (which powers in their exercise are above the written law, and bear "no resemblance to the usual process of courts")[27] is found in an historical inquiry into the nature of those prerogatives. The treatment by Blackstone of the subject of kingly prerogatives persuasively and stirringly demonstrates that no such arbitrary prerogatives ever existed, nor anything analogous thereto. Doubtless, in considering this phase of the question it ought to be remembered that the Colorado statutes early annexed to our soil the common law of England as it existed "prior to the fourth year of James the First," with the distinct reservation, which lawyers will always bear in mind, and which must have been modified by the Colorado constitution, that the common law then existing was adopted only "so

[21] 1 Wis. 317.

[22] Attorney General v. R. R. Companies, 35 Wis. 425, 522.

[23] See *In re* Court o f Honor, 109 Wis. 625, 631-2.

[24] See for this and other suggestions, an article in The Green Bag, April, 1905, by William E. Hutton, Esq., of the Denver Bar.

[25] State v. Cunningham, 81 Wis. 440, 447; State v. Houser, 122 Wis. 534, 555; State v. R. R. Co., 35 Wis. 425. See language C. J. Ryan at p. 517.

[26] People v. District Court, 86 Pac. Rep. 92.

[27] People v. District Court, 86 Pac. Rep. 90.

far as applicable and of a general nature."[28] Under the common law at the time to which our statute relates, as shown by Blackstone, the arbitrary exercise of so-called kingly prerogatives was regarded by the English people with inexpressible resentment. Blackstone, in discussing the prerogatives claimed by royalty in the later years of Henry VIII. and in the reign of Queen Elizabeth, says of the time of Henry the Eighth, that the prerogative, as it then stood, was "too large to be endured in a land of liberty."[29] And, discussing its exercise by Queen Elizabeth, who succeeded him, he adds, that she had the wisdom to throw "a veil over the odious part of the prerogative."[30] Coming down to the reign of King James the First, to the fourth year of which our common law statute directly refers, Blackstone has a dramatic description of the efforts made then to give life to arbitrary prerogatives, which ought to quicken the pulse of every man who looks on the assertion or exercise of kingly prerogatives by the Colorado Supreme Court, as one of the most striking and anomalous invasions of our constitutional liberties. This is the language of the famous English commentator: "The unreasonable and imprudent exercise of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon wakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit subversive of liberty and property and all the natural rights of humanity. They examined into the divinity of this claim and found it weakly and fallaciously supported, and common reason assured them that if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation and found they had ability as well as inclination to resist it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial, and they gained some little victories, in the cases of concealments, monopolies and the dispensing power."[31]

The English Court of King's Bench.—Only two or three things more in regard to the historical exercise of the so-called high "prerogative" jurisdiction need be said. The first is, that a critical examination of the old jurisdiction of the Court of King's Bench in England shows it more nearly equivalent to the Colorado district courts than to the supreme court. For instance, while it kept inferior jurisdictions within bounds of their authority, as do our district courts in a measure, it appears to have been a court of general original jurisdiction of personal actions.[32] More important than all else, however, to be considered, is the fact that the Court of King's Bench was not a court of *dernier resort*, but that cases might be removed from it by writ of error to the house of lords or the court of exchequer chamber.[33] Nothing could be more historically helpful than this fact, because the exercise of high exclusive prerogative jurisdiction by the Colorado Supreme Court, under our written constitution, leaves to the people of that state no right of appeal, whereas the exercise of arbitrary and unlawful powers under the English unwritten constitution was always subject to appellate construction and reversal. In this connection it is interesting to remember, as already pointed out, that the Colorado Supreme Court, in retaining jurisdiction of the Tool case, and issuing its sweeping orders, particularly guarded itself in such a way that no appeal might be successfully taken to the courts of the United States. The desirability of a right of appeal from any decisions based on hidden and undefined authority not clearly expressed or plainly implied in the written law, is too manifest for discussion. If the right of appeal is ever entitled to preservation, surely no emergency could more imperatively demand its exercise.

The English King and Constitution.—We come now to the final historical word to be spoken in regard to the exclusive kingly prerogatives claimed and exercised by the Colorado Supreme Court. It is, that under the ancient English constitution and common law, whatever mistaken ideas may prevail to the contrary, there was absolutely no legal authority for the manifestation of arbitrary monarchical power. On this subject Henry de Bracton, whose authority will not be disputed, writing in the thirteenth century, had these decisive words to say: "The king ought not to be subject to man, but to God and to the law; for the law maketh the king. Let the king therefore render to the law what the law has vested in him with regard to others; dominion and power, for he is not truly king, where will and pleasure rules, and not the law."[34] Bracton also expressed the same doctrine in these words: "The king also has a superior, namely, God, and also the law, by which he was made king."[35] So, writing about two centuries later, Sir John Fortescue confirmed this conception of the English Constitution in these words: "The king of England must rule his people according to the decree of the law thereof; in so much that he is bound by the oath on his coronation to the observance and keeping of his own laws."[36] The doctrine, therefore, that the king is above the law, and the kingly prerogatives afford the judiciary claiming to represent them, a right to the exercise of arbitrary powers not otherwise sanctioned by the law, and, in this country, not sanctioned by the writ-

[28] Vol. 2, Mills' Ann. Stat. of Colo., sec. 4184.
[29] Blackstone, Vol. 4, Star page 435.
[30] *Id.*
[31] *Ib.*, Star page 436.
[32] Blackstone, Book 3, Star page 42.
[33] *Ib.*, Star page 43.
[34] L. 1 c. 8; Blackstone, Book 1, Star page 234.
[35] L. 2 c. 16, Sec. 3; Blackstone, *Id.*
[36] Blackstone, *Ib.*

ten law, must be taken as forever shattered. This, also, it would seem, is the message in Sir Edward Coke's famous sentence: "Magna Charta is such a fellow that he will have no sovereign." The monarchs of an hour, and their sycophants, might assert the contrary, but over them forever towered that ancient constitution which preceded and has survived them.

The English theory of kingly prerogatives has, of course, been thus reviewed only because of the elaborate fiction built around the exercise of exclusive prerogatives by our supreme court. One returns from the quest refreshed to find, that, in this country, and under our laws, in place of indefinite powers being vested mysteriously in the agencies of government, they inhere in the people, who are the ultimate and real sovereign, and from whom, alone, their derivation may be traced.

The Constitutional Checks and Balances.—The whole discussion compels us to resort once again to the Colorado constitution for an understanding of the original intent of its framers as to the field in which judicial authority might be exercised. Article III of the constitution reads as follows: "The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial—and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly provided or permitted." Section 5 of Article II, has this provision: "That all elections shall be free and open; and, no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." In Article VII, sections 11 and 12, we have the words: "Section 11: The general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise." "Section 12: The general assembly shall, by general law, designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto; but no such law shall apply to any contest arising out of an election held before its passage."

There is nothing novel in the intent of the constitutional sections quoted. Following the plan of the federal constitution they define the triple division of powers in this state, and delegate to the legislature the protection of the ballot. It is well established, under such provisions, that the power to provide for the regulation, conduct and contest of elections lies exclusively within the legislative authority,[37] and any interference by our courts with this constitutional grant is only defensible on clearly expressed or necessarily implied warrant in the constitution. Of course, as a matter of fact, the Colorado legislature has provided a complete system of laws touching elections, and the supreme court in the Tool case, therefore, palpably infringed on the legislative functions in numerous instances. It imposed additional penalties to those provided by the legislature for election crimes; it commanded the performance of acts contrary to the legislative requirements; it controlled not only the mandatory statutory duties but also the legal discretion of election officers; where other legal remedies existed, it enjoined crime pure and simple, and it provided at least a preliminary mode of election contest changing the immediate result of the election, even though it argued that its action did not deny the legislative mode of contest as a subsequent matter. It may be justly asked, if it is desired to endow our courts with power to deal summarily with election matters, why is it that the legislature, with full authority, has made no provision for such action by our courts? Unless, therefore, justification for the action of the supreme court may be found in general equity practice, it is a moderate statement of the case to say that the supreme court in the Tool case, not only violated the state constitution but set a precedent for future action most alarming to contemplate, in the possible exercise and expansion, not only of the injunctive but the other so-called "prerogative" writs, as well.

The Equity Jurisdiction Theory.—But it is contended by an occasional attorney, that the Colorado Supreme Court, being vested with original jurisdiction in regard to certain writs, including injunction, was entitled as a court of equity to meet, through equitable processes purely, the election dangers menacing constitutional government in 1904 in Colorado. Those, who urge this view, generally concede the accepted doctrine, that courts of equity may not ordinarily supervise and control elections. That doctrine has been well stated both in Colorado cases and in the decisions of a practically undivided line of courts of this country. On the general subject of the right of a court of equity to enjoin an election, the Supreme Court of Maryland has said, in a typical utterance: "The writ of injunction will not be awarded in doubtful, or any cases not coming within well established principles of equity. * * * Each voter has a separate and distinct remedy for the willful improper deprivation of his vote; and the joinder of others like circumstanced or injured as complainants in equity on the ground of avoiding multiplicity of suits will not afford equitable relief. * * * For irregularities in the conduct of an election, for receiving illegal or rejecting legal votes, and for the correction of consequences resulting therefrom, the law provides appropriate remedies and modes of procedure. Such matters are not the subject of equitable jurisdiction."[38] And, as stated, authorities to the same effect might be multiplied

[37] McCrary, Elections (4th Ed.), Sec. 112.

[38] Hardesty v. Taft, 87 Am. Dec. 584, 590-591.

indefinitely.[39] But it is urged by those who attempt a justification of the supreme court in the Tool case, that, conceding the general propositions of law, that equity can not ordinarily enjoin crime pure and simple, or supervise merely political elections,[40] nevertheless there is a reserved power in courts of equity which is rarely called into exercise in our day, but is really latent in them. It is said to be represented by the fine old maxim to the effect, that wherever there is a wrong there is also a remedy. It is conceded, by those who advance this doctrine, that the prerogative reasons, given by the supreme court for its action in the Tool case, were bad, or, if not bad, were unnecessary. The doctrine is one, evidently of inherent powers in courts of equity to do unprecedented things to meet unprecedented energencies, it being contended, that the admitted gross violations of the election laws by election criminals in times past in Colorado had created such an emergency. It is pointed out, that, in the ancient history of the law, new writs were in fact evolved to meet new situations and that, in the natural course of time, the original and remedial writs so employed gradually came into general use in the courts.

Constitutional Unsoundness.—In answer to this plausible statement it should be noted that it avers that existence of inherent powers in our courts, without regard to express or implied constitutional grants, which has been distinctly denied by constitutional writers from the beginning, and which is, in fact, diametrically opposed to a safe or sane interpretation of our written constitutions. The first criticism of this doctrine, therefore as applied to the Colorado courts, is, that it is violative of the Bill of Rights and of the sections of the Colorado constitution which separate our government into three departments and put in the legislative department the power to regulate and provide penalties for the interference with elections. Carried to its logical end, the argument means that our courts of equity may, at any time the emergency is deemed adequate, by our supreme court at least, combine executive and legislative with judicial functions, as in the Tool case, and overturn, without the likelihood of a successful political contest, all the political results of a great election. Little does one sense the true spirit of republican institutions who can look with favor on such a perversion of ordinary judicial functions. Better would it be, in the opinion of thoughtful citizens, to have a continuation even of the political overthrow of government through gross election frauds, leaving it to our people to end that overthrow by summarily violence if need be, than to have judicial subversion of the laws. Judicial revolution is not preferable either to executive despotism or the temporary rule of the mob, and unless the people, regardless of their courts, through proper executive and legislative channels, and these failing, through a burning indignation expressed in action, shall reassert the inviolability of the suffrage, then government by the people not only should fail: it has already failed.

Historical and Practical Inadequacy.—This is, however, but one of many reasons. Assuming that our courts of equity may provide new remedies for new wrongs, is it not a memorable fact, that they have, nevertheless, consistently, through ages of popular government, declined to attempt to control and supervise the course of purely political struggles? The question answers itself—the courts have refused through a sense of the overwhelming unwisdom of any other course. Moreover, if this power inheres in courts of original equity jurisdiction, then all such courts may alike exercise it, and it is a proper practical, if not legal, question, whether it is desirable to scatter so important a power among the numerous district courts of original jurisdiction in Colorado.

There are practical objections, however, which, unlike the last, do go to the very source of equity jurisdiction, when placed on the given grounds. It is submitted, that the right of supervision of elections, experimented with in the Tool case, once conceded, can never properly be denied, and, in the ordinary run of events, must fail toachieve its ends. Regardless of the real necessity for the use of the writ, sufficiently pleaded allegations can, of course, be made in every political controversy to require its issuance, and once issued, where will the writ lead? If the Tool case is the answer, the reply is discouraging. In that case the court based its interference on the duty of protecting the sovereignty of the state and the liberties of the people. Who, today, knows that what it sought was accomplished? Ten election precincts were excluded from the canvass of the returns. The exclusion made possible and assured the overturning of the political character of one branch of the legislative department of government, altered the membership of the supreme court itself, and even influenced—how far none can say—a contest over the high office of governor of the state. Was justice done? Was the popular choice judicially enforced? Who shall say? Legal and illegal votes were indiscriminately excluded from the count. The handwriting experts could distinguish illegal ballots; why not the legal as well? No legal review of the result was ever undertaken. A contest in the senate would have been purely political, and it is doubtful whether a legal contest for county offices could have been prosecuted with confidence in

[39] See State of Georgia v. Stanton, 6 Wall. 50. 76; Green v. Mills, 69 Fed. Rep. 852. As to injunctions against crime, irrespective of property rights, see, to the same effect, People v. District Court, 26 Colo. 386, 397-8.

[40] It is, perhaps, unnecessary to note that the Tool case, wherein as shown, a purely political struggle was supervised by injunction, does not fall within the class of cases where courts of equity, at the instance of taxpayers, have enjoined public officials from disposing of public property corruptly and in breach of their public trust.

the justice of the outcome through the judicial review by the supreme court, which had already, in a way, tried and adjudged the case. Such is our first experiment with the "judicial enforcement" of election laws.

The Judiciary in Politics.—A more serious objection than any, except the constitutional one, remains to be mentioned. It is that, by the attempts of our judiciary to supervise elections, our judges are uselessly destined to reap a bitter harvest of public discredit. When, as in the Tool case, the result of such supervision is a change in the political complexion of the *prima facie* returns, the charge of corruption against the court is easily made, and will, ordinarily, be widely and strongly credited. However sincere the members of the Colorado Supreme Court may have been in their action—and lawyers will be the last to question, in any particular, the integrity of its members—there is no doubt, in the world, that the result of the Tool case was the unfortunate injection of that high court into the politics of the state, and that, as long as any judge who affirmatively participated in the result of the Tool case is before the public, he will be assumed, by great numbers of his fellow citzens, to have acted in his decision from unjudicial motives. Nothing could be more deplorable than such a state of affairs, touching our judiciary, particularly at its fountain head, nor could anything more seriously impair the object sought by the framers of the Colorado constitution, who, in their original address to the people of the state, recommended the drafted constitution to an affirmative vote, because one of its purposes was, as they expressed it, to take "judicial elections out of the arena of party politics."

Conclusion.—The following more important conclusions from this long discourse, are therefore respectfully suggested: that the Tool case is untenable, both in judicial reasoning and as a precedent for judicial action; that its findings were grievously violative of the Colorado constitution; that no court is warranted, by the Colorado laws or constitution, in the attempted supervision of those elections, at least, which are of a purely political nature; that, historically, there is no sanction for an assertion of prerogative powers, above the law and the constitution, by any court of this state; that the only powers, which our courts or other agencies of our people may exercise, spring, directly or impliedly, from plain constitutional grant; that the supreme court has no original jurisdiction, which does not, also, exist in our district courts; that equity may not create, irrespective of constitutional or legislative grant, a new remedy to meet political crimes; that the attempt of the courts so to deal with a political situation is impracticable, ineffective and disastrous to the prestige of such courts as a whole, and of their individual members; and that it is a mistake to assert that either the executive, the legislative or the judicial department of our government is other than co-ordinate, or is dowered with those kingly attributes which in a republic, until transferred, can only inhere in the sovereign people.

Such a judicial announcement as the Tool case, is justly entitled to be known as Colorado's Dred Scott decision, because of its signal importance and because, unless reversed or made inoperative by our highest court, soon or late it must meet a decisive popular reversal. This direct and unequivocal characterization of a dangerous decision, is believed to be the necessary expression of those whose sense of citizenship combines criticism and respect for our courts. The Tool case in its extent of doctrines and practices, is a striking example of the unexpected vitality of those retrogressive forces which continually endanger human freedom. It embodied neither the announcement nor trial of constitutional doctrines consistent with the genius of republican institutions. Unfortunately and anomalously, it represents, instead, judicial usurpation, and revolution. It has overthrown, at once and indiscriminately, the precedents and practices of courts of equity in many ages, and the legislative enactments and constitution of Colorado, and it has done all in the name of the prerogatives of ancient kings, whose arrogant pretensions were humbled, and whose baselessly asserted rights were transferred in other centuries by popular uprising to the sum of popular liberties. Nor has the cause of honest elections benefitted at this enormous expense—defended under the unfortunate name of "judicial sovereignty." Instead there is a reasonable basis for the conviction that honest elections are more seriously menaced in Colorado than before. As a result of that decision, certain members of our highest court are daily and publicly assailed as "political judges," a fact which, however untrue, reveals the popular understanding, that, should the supreme court ever be given over to the occupancy of men who exalt politics above patriotism and law, the precedent in the Tool case will be dangerous in the extreme.

The lesson of the Tool case is the duty of preserving so far as possible that original balance and separation of those three departments of government, distinguished and limited with consummate wisdom by the framers of the federal constitution. In the short space of seven years in three memorable cases—*In re* Morgan,[41] *In re* Moyer,[42] and The People v. Tool, the Colorado Supreme Court has successively been asked to interpret, in the most practical and far-reaching form, the true boundaries and co-ordination of the whole field of legislative, executive and judicial departments, which constitute, in combination, the state government of Colorado. That trinity of cases is worthy of the moralizing pen of a great historian. Never was a more brilliant opportunity afforded any court to lay wide and deep and

[41] 26 Colo. 415.
[42] 85 Pac. Rep. 190.

strong the judicially interpreted constitutional foundations of a state's jurisprudence. Yet the most casual examination of those cases convinces one that none of them was decided with full regard for the others, or a comprehending emphasis on their common underlying principles. In effect, the Morgan case subordinated the legislature to the judiciary; the Moyer case subordinated the judiciary and the legislature to the executive department; while the Tool case proclaimed the supremacy of the judiciary over both the legislature and the executive department. And the retribution for these unscientific inconsistencies has followed, is following and will continue to follow, in distressing but luminous consequences. It surely is time in Colorado, for bench and bar alike, to turn new and reverent faces toward the constitutional East, where was builded that temple of truly co-ordinate governmental departments, which an English statesman described as the greatest work ever struck off at one time by the mind and purpose of man.

Denver, Colo. EDWARD P. COSTIGAN.

RIGHT OF PARENT TO PROCEEDS OF SERVICES OF MINOR CHILD.

CULBERSON v. ALABAMA CONST. CO.

Supreme Court of Georgia, Feb. 15, 1907.

Where a minor son, without his father's consent, makes a contract for his services with a third person, and the father knows that he is in the employment of such person, and neither makes any objections nor demands pay for his child's services from such employer, there is an implied assent by the father that the son shall receive his earnings in such employment.

Where a father sues one who, without his consent, has employed his minor son, to recover the value of his son's services while employed by the defendant, basing his action upon a contract implied from the circumstances of the case, and it appears that the employer, while such minor was engaged in his service, supplied him with necessaries for his support and maintenance, the recovery of the plaintiff should be limited to the reasonable value of the services, less the reasonable value of the necessaries so furnished.

Culberson, a resident of the state of Alabama, brought a suit, based on an attachment, in Bartow county, Ga., against the Alabama Construction Company, an Alabama corporation, doing business in that county, for the recovery of $450, alleged to be due him by the defendant for the services of his minor son. The petition based upon the attachment, alleged that the defendant on July 1, 1903, employed Kirkland Culberson, the plaintiff's son, then under the age of 16 years, as a day laborer; the plaintiff protested against the employment of his minor son by defendant, and used repeated efforts to induce his child to return to his home, but that the officers and agents of the defendant company induced his child to remain in its employment and work for it, and that the boy did work for defendant from July 1, 1903, until March 1, 1905, for which the defendant was indebted to plaintiff $450, "the wages of his said minor child for said work, plaintiff alleging said services to be worth $1 per day." The defendant denied all the allegations of the petition, except the allegation as to the suing out of the attachment and the allegation that defendant had refused to pay plaintiff the sum sued for, or any other sum. Upon the trial of the case it appeared, from the evidence, that the plaintiff lived in Anniston, Ala., and that the services of his son, for which he sued the defendant, had been performed in connection with railroad construction work, at and near various other places in Alabama and Cartersville, Ga. It also appeared that this railroad work was first carried on, and the plaintiff's son first employed thereon, by a partnership, consisting of D. B. Lacy and Mrs. Susan E. Jones, doing business under the firm name of the "Alabama Construction Company," and that later this partnership was succeeded by a corporation, incorporated in the state of Alabama, under the same name, upon the application of D. B. Lacy and three other persons, not including Mrs. Jones, which corporation—the defendant in this case—continued the work of railroad construction and employed the plaintiff's son thereon. The jury foud a general verdict in favor of the defendant, the plaintiff moved for a new trial, which was refused, and he excepted.

EVANS, J. (after stating the facts): 1. Complaint was made in the motion for a new trial that the court erred in charging the jury that a father's parental power over his minor child is lost, by voluntary contract releasing his right to a third person, by consent to the adoption of the child by a third person, by his failure to provide necessaries for his child, or his abandonment of his family, by his consent to the child's receiving the proceeds of his own labor, such consent being revocable at any time, and by cruel treatment of the child, and that it was for the jury to determine whether the plaintiff, in any one or more of these ways, had lost control of his boy. The assignment of error was that this instruction was erroneous, because "the issues before the jury, under the evidence, was whether or not the father had ever consented that his minor child (should) receive the proceeds of his own labor, and whether such consent had ever been revoked by the father; and there was neither contention nor evidence that the father had lost his parental control in any of the other ways mentioned by the court. The trial judge specifically approved this ground of the motion, and certified that the facts stated therein were true. So we must take the statement that there was no contention that the father had lost his parental power in any of the ways mentioned by the court, except by his consent to his son's receiving the proceeds of his own labor, as being true. It is evident from the excerpt from the charge set out in the motion for a new trial that the judge, in instructing the jury as to how parental power may be lost, read to them the provisions contained in the numbered para-

graphs of section 2502 of the Civil Code of 1895 upon the subject, merely omitting paragraph 5 in reference to the loss of parental control by consent to the marriage of a minor child. He not only did this, however, but he instructed the jury that it was for them to determine "if this father, in any one of these ways, or any more of them, lost control of the boy." So he was not merely reading to the jury the provisions from this section of the Code as to the loss of parental power, in order that they might see that one of the ways in which such power may be lost is by the father's consent for his minor child to receive the proceeds of his own labor, but also in order that they might consider whether this father had lost control of his minor son in any one or more of the other ways mentioned by the court. This construction of this portion of the charge is further shown to be correct by other excerpts from the charge upon which error was assigned in the motion for a new trial, wherein the jury were instructed that if they found that the plaintiff had by voluntary contract released his parental right to a third person, or failed to provide necessaries for his child, or cruelly treated the child, or had "consented to his child being adopted by the defendant," he could not recover, and the jury must look to the evidence to see whether he had done either of these things. As there was neither contention nor evidence as to the loss of the parental power in any way save by consent to the son's receiving the proceeds of his own labor, the court erred in these instructions. It has been so long and so repeatedly held by this court that a charge abstractly correct, but not warranted by the evidence, is erroneous, that we deem it unnecessary to cite any of the great number of cases to this effect. It not being apparent from the evidence that the jury could not have been misled by these repeated erroneous instructions of the court, a new trial should have been granted because of their existence.

2. Another assignment of error in the motion was that the court erred in instructing the jury that if they believed that the plaintiff's minor son was in the employment of the defendant company "with the knowledge of the father, and the father did not complain nor demand payment for his services, such failure would be in effect a ratification of such employment, and the father could not recover." The error assigned was that this instruction "was inapplicable to the facts of the case, as well as an erroneous statement of the law." It was not inapplicable to the evidence in the case, nor do we think it was an erroneous statement of the law. While the expression "ratification of such employment" may not have been strictly accurate in the connection in which it was used, the evident meaning was that, under the circumstances stated by the court, the father would have impliedly assented to the employment of his son by the defendant. Section 2502 of the Civil Code of 1895, as we have seen expressly provides that the parental power of the father, including his right to the services of his minor child and the proceeds of his labor, may be lost by his consent to the child's receiving the proceeds of his own labor. The charge of the court, in effect, was that such consent of the father would be implied if he knew that his minor son had entered the employment of another, and with such knowledge, did not forbid such employment nor demand payment for the services of his son. This charge of the court was in accordance with the rulings in Whiting v. Earle and Trustee, 3 Pick. (Mass.) 202, 15 Am. Dec. 207; Smith v. Smith, 30 Conn. 111; Armstrong v. McDonald, 10 Barb. (N. Y.) 300; Gale v. Parrott, 1 N. H. 28. In the case first cited the court said: "We go so far as to say that when a minor son makes a contract for his services on his own account, and the father knows it, and makes no objection, there is an implied assent that the son shall receive his earnings." In the Connecticut case: "The plaintiff's minor son agreed with the defendant to work for him for the season, at certain monthly wages, to be paid to the minor. The plaintiff, who lived near by, knew of the agreement, and, that his son was working for the defendant, but made no objection and gave the defendant no notice that he should demand his wages. After the work had been done, and the defendant had paid the son, the plaintiff demanded his wages." It was held "that he was estopped from claiming them." In the opinion, Sandford J., said: "The plaintiff's conduct was evidence of his assent to that contract, and its performance as well by the defendant as the son, and operates against the plaintiff as an estoppel upon his present claim. Knowing of the contract and having an opportunity to prohibit and prevent its execution, he remained silent, and thus induced the defendant, and very justly, to infer his assent and approbation. If plaintiff can recover for these services, his conduct will have operated as a delusion and a fraud upon the defendant; but he is not entitled to such recovery." In the New York case it was held: "When a minor makes a contract for his services, on his own account, and the father knows of it, and makes no objection, it seems that there is an implied assent that the son shall have his earnings." The court cited for this Whiting v. Earle and Trustee, *supra*. In the New Hampshire case the court held that the parent's right to payment for his minor child's services "may be waived by acts evincing an assent to the minor's receiving payment himself." Our own case of Wolf v. East Tenn. Ry. Co., 88 Ga. 210, 14 S. E. Rep. 199, is directly in line with these authorities. There a minor, by his father as his next friend, sued the railway company for damages arising from personal injuries received while in its employment, and the father sued the company for the loss of the services of his son, resulting from such injuries. The son testified that his father did not consent to his employment on the railroad, but knew of it and did not forbid it. It was held that a

"nonsuit was properly granted as to the action in favor of the employee's father; his implied consent to the employment of his minor son by the railway company being fairly deducible from the facts in evidence, and there being no proper foundation for an inference to the contrary."

3. The court charged the jury as follows: "Until majority the child remains under the control of the father, who is entitled to his services and the proceeds of his labor. I charge you that what is meant by the word 'proceeds' in this section is the proceeds of his labor reduced by the necessary expenses of maintenance. If you find from the evidence that the services of Kirkland Culberson were not worth more to the defendant company than his board, lodging, and clothing, then the plaintiff could not recover. The plaintiff could require the defendant to pay all of Kirkland Culberson's expenses, and then pay him for the gross value of his son's work, without crediting this amount with the amount expended by the defendant for the necessary expenses of the minor." Error was assigned upon this charge, as not being pertinent to the issues made by the pleadings and evidence, and as being an erroneous statement of the law. The evidence showed that a part of the wages of the plaintiff's son were paid to him in necessaries furnished by his employer. As a mere abstract statement of the law, this instruction of the court was not exactly accurate, for a father maintaining his minor child at home, or supplying him with necessaries elsewhere, would be entitled to the proceeds of his labor, unreduced by the unnecessary expenses of his maintenance. The material question, however, is whether the charge of the court, as applied to the case on trial, was an erroneous statement of the law. The plaintiff did not sue to recover damages for the loss of the services of his son, but he waived all consideration of tort and sued upon an implied assumpsit; that is, upon an implied promise of the defendant to pay him the value of his son's services. When a promise is implied from the existence of certain circumstances, in order to assume the promise implied, all of the pertinent circumstances must be taken into consideration, and not simply those which are favorable to one side only. Accepting the theory of an implied promise, the circumstances, not denied, that the defendant supported the plaintiff's son while he was engaged in its service, was material in ascertaining what implied promise of the defendant to the father was; for it could not be reasonably held that the defendant took the plaintiff's son into his employment, supplied him with necessaries while in such employment, and yet impliedly agreed to pay the plaintiff the entire abstract value of his son's services, without deducting therefrom the reasonable value of the necessaries furnished. In Adams v. Woonsocket Company, 11 Metc. (Mass.) 327, the plaintiff whose minor daughter was employed by the defendant company, at a distance of many miles from his residence, forbade the company to employ her any further, and gave notice that, if it did, he should demand $3.50 per week for her time and labor, without any deduction on any account whatever, and also directed the company not to allow or pay her anything, either goods or money, on account of her labor. It was held that "in an action of assumpsit by the father against the company, to recover pay for his daughter's labor subsequently done for them, he was entitled to recover only so much as her labor was reasonably worth, deducting the price of board provided for her by them, without any deduction for clothing which they provided for her." In the opinion, Dewey, J., after holding that the notice which the plaintiff gave the defendant company was wholly ineffectual to charge the defendant in any particular sum, said: "There was no special contract, therefore, as to the amount of wages; and in an action of assumpsit the plaintiff must rely upon the implied contract of the defendants to pay what the daughter's services were reasonably worth. If the defendants furnished her board, the sum to be recovered will be the value of the services of a person thus furnished with board by the employer. This seems to be reasonable, as the father could not have furnished board for her in his own family while she was thus in the employment of the defendants; he living at a distance from her. And it must be the proper rule in an action where the plaintiff waives a tort and sues upon an implied assumpsit. The claim of the defendants for articles for clothing for the minor, we think, stands upon a different footing. The father might well object to the expenditure on this account of any money for clothing for his daughter. No deduction should be made on that account." The distinction which the court here made between board and necessary clothing seems to have been based upon the idea that the father could not have furnished his daughter with board in his own family while she was in the employment of the defendant, but that he could have supplied her with suitable clothing while thus employed. It may be true that the father could have supplied his daughter with necessary clothing while she was in the service of the defendant, but, if he did not do so, and the defendants did, it seems to us that the clothing and the board would stand upon the same footing; for, as we have said, when implying a contract from circumstances, all the pertinent circumstances must be taken into consideration. And in a case of this character it would seem that the implied contract of the employer was to pay the father the reasonable value of the services of his minor child when furnished with necessary board and clothing by the employer.

In a later decision by the same court, in a case where a father sued for the earnings of his minor son while in the employment of the defendants on board their whaling schooner, upon an im-

plied promise of the defendants to the plaintiffs, it was held: "In an action of contract by a father for the earnings of his minor son, employed with his consent, the measure of damages is, not what the son would have earned for the father during the time, but what he in fact earned in the service of the employer. The father in such a case can recover only what the son might have recovered had he been of age and competent to contract." Weeks v. Holmes, 12 Cush. (Mass.) 215. It appeared, from an agreed statement of facts in the case, that it was a well-established and universal usage in the whaling business "for seamen engaged therein to sail upon a lay, or to receive in place of wages for their time and services a certain relative proportion of the proceeds of the voyage, such as their relative experience and skill may entitle them to, or such lay or proportion as they may agree upon beforehand;" that "the reasonable, usual, and only lay received by" green hands, such as the plaintiff's son, "was a one-hundredth lay, or a one-hundredth part of the proceeds of the oil taken upon the voyage, after deducting the proportion of the expenses of fitting the vessel, and all advances made each one on account of the voyage." Chief Justice Shaw, delivering the opinion, said: "This is an action of contract on the implied promise by the defendants to the plaintiff, a promise implied from his relation of father entitled to the earnings of his son. Nothing can be claimed in this action for any supposed wrong in seducing the plaintiff's son or employing him without his consent. After the service was done, the father steps in with his legal claim, denies the authority of his son to receive his own earnings, and in effect, says to the defendants, 'that which you would have been bound legally and equitably to pay him, had he been of age, or otherwise competent to contract, I require you to pay me.' To this extent his claim is recognized, and no further. In determining what that allowance shall be, the question is, not what the son would have earned for the plaintiff, but what the son earned of the defendants in their service. *Quantum meruit?* In considering what he did in fact earn, it appears to us that the universal custom of the business to pay by a lay or share, instead of monthly or other wages, is competent and proper. * * * Upon the facts the court are of opinion that the plaintiff is entitled to a fair share or lay; and this, we think, must be fixed as a one-hundredth part, not because the minor agreed to it, but because it is shown to be a reasonable and fair lay, and therefore a just measure of the value of the services sued for. From this is to be deducted the advances of the defendants, for outfit and necessaries on the voyage, warranted by the like universal usage of the business; and, as these exceed the lay, there are no net earnings to be recovered." It will be observed that the court, in implying the contract between the plaintiff and the employers of his minor son, took into consideration all the circumstances under which the minor was employed, the usages of the particular business, the advances made to the minor for necessaries, etc., and held that from the gross amount of the minor's earnings there should be deducted the advances of the defendants for his proportion of the expenses of the outfit and for necessaries furnished to him by them. So, notwithstanding the use which the court made of the universal custom of the business in which the plaintiff's son was employed, we think it clear that, when the underlying principle of the case is followed, a father suing, upon an implied contract, for the fault of his minor son's services to the defendant, cannot recover the gross value of such services when the defendant has supported the minor while in his employment, but can only recover what the minor's services were reasonably worth when employed and supported by the defendant; for if, as appears to have been held by the court, a father suing upon such an implied contract can recover only what the son could have recovered, if he, being of full age when the services were rendered, had performed those services under an implied contract, then it must necessarily follow that the reasonable value of the maintenance furnished to the son by his employer must be taken into consideration when determining the amount due by the employer for the services rendered.

In Sherlock v. Kimmell, 75 Mo. 77, it was held: "If a minor son hire himself out without the knowledge of his father, the father may either adopt the contract and claim whatever is due under it, or he may repudiate it and claim the value of his son's services. In the latter event, if it appears that the employer has permitted the son to use part of his time for his own purposes, the measure of the recovery will be the value of his entire time, less the value of the privilege so accorded to him." There the plaintiff's son, while in the employment of the defendant, was allowed to devote part of his time to giving music lessons, for which he received pay; and the court rightly took this circumstance into consideration in determining what the implied contract with the father was. In Huntoon v. Hazelton, 20 N. H. 388, it was held that "if a minor son abscond from his father's house, and enter the services of one who for his labor furnishes the infant a reasonable support, the parent cannot recover the son's wages, without deducting the amount of expense for such support." That ruling appears to have been based upon the idea that, although a minor son who absconds from his father's house may not "carry with him the credit of the parent to the extent of procuring reasonable supplies, common humanity would require that he should be suffered to apply his own industry for the relief of his necessities," as "without that privilege the minor would starve, and the law, which is really designed for the protection of infancy, would visit such fault or error as is here supposed with the penalty of the most debased form of vagrancy." In Dunn v. Altman, 50 Mo. App.

231, where the plaintiff, who sued for the value of his minor son's services, claimed that the boy was employed by the defendant without his consent and, over his protest, the court said: "It seems to be conceded by the plaintiff in argument that, even upon his own theory, the defendant is entitled, to the extent to which he may have supplied the boy with necessaries, to an abatement of the amount due by the defendant to the plaintiff;" and cited Huntoon v. Hazelton, *supra*. But the court held that where, in such a case, the defendant "seeks to reduce the amount of recovery on the ground that he supplied the minor with necessaries, the burden is on him to show the extent of the necessaries supplied by him; and evidence that he paid wages to the minor, allowing the minor to apply the same as he wished, will not suffice, though it appears that the same were partially used by the minor in the purchase of necessaries." It follows from what we have said that, in our opinion, the charge of the court which we have just been considering afforded no cause for a new trial.

Judgment reversed. All the justices concur, except Fish, C. J., absent.

NOTE.—*Under What Circumstances a Father Impliedly Waives or Forfeits His Right to His Child's Earnings—Implied Waiver.*—It certainly is an axiomatic principle in the law of parent and child that a father is entitled to the earnings and services of a minor child, who lives with him and is under his governance, protection and support. The ground for this rule is to be found in the fact that the child usually remains with the parent, and under the law the latter is responsible for supplying him with food, clothing, and shelter until he becomes of age, together with proper protection and education. In view of the imposition of such heavy obligations resting upon the father, the latter is given certain rights and privileges in regard to the earning power of his child until he becomes of age, and such rights and privileges are supposed in the law to counterbalance the obligations imposed. It is, therefore, only by the express or implied consent of the father that a child can become entitled to his earnings. While we will not consider the express consent we might mention three usual methods of expressing such consent, to-wit: adoption, relinquishing complete control of the child to such a third person; emancipation contract with the child releasing the child from his obligation to turn over the proceeds of his earning power to his father; and assignment of the mere right to the proceeds of the child's labor to some third person. What, however, may be done by direct or express contract may be implied from circumstances. Therefore a father's relinquishment of claim to the earnings of his child may be implied from the attitude which the father takes to his employment and other circumstances surrounding the particular case. Bener v. Edgington, 76 Iowa, 105, 40 N. W. Rep. 117; Dierker v. Hess, 54 Mo. 246; Benziger v. Miller, 50 Ala. 206. Thus, where an agreement of employment makes the wages payable to the employee, a minor, the father of the minor, by confirming and approving the agreement, releases, in favor of the minor, his right to wages earned under the contract. Taylor v. Welsh, 92 Hun, 272, 36 N. Y. Supp. 952; Pardey v. Windlass Co., 19 R. I. 461, 34 Atl. Rep. 737. So also where a minor son makes a contract for his services on his own account, and his father knows of it and makes no objection, there is an implied assent that the son shall have his earnings, so that, unless there is a design to defraud the father's creditors, the earnings will belong to the son. Chase v. Smith, 5 Vt. 556; Burdsall v. Waggoner, 4 Colo. 261; Whiting v. Earle, 20 Mass. (3 Pick.) 201, 15 Am. Dec. 207. So also a father impliedly relinquishes all claim to his child's earnings when he permits or encourages him to leave the parental homestead and labor for his own support and benefit. So also where property is given a child with the consent of his father, though in payment of wages, it belongs to the child. Joeckel v. Joeckel, 56 Wis. 436, 14 N. W. Rep. 598. So also, where a minor child, without objection from his father, gives his mother the benefit of his labor on her separate estate, profits wrought by the child's labor will not be liable for the father's debts. Trapnel v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570, 38 Am. St. Rep. 30. So also where the mother of an infant daughter is married to a second husband, and the daughter does not live with the mother, and is not provided for by her, but is allowed to receive and appropriate to her own use the wages she earns, the mother cannot, in the absence of an express promise to pay her, recover such wages. 49 Ind. 378, 19 Am. Rep. 687. So also a parent's consent to his son's enlistment in the army or navy is a relinquishment of all claim for services or earnings during the term of the enlistment. Baker v. Baker, 41 Vt. 55. So also a father cannot recover the wages of a minor child where there is an understanding with the child that the wages shall be paid to him, and he has made no contract with his employer in respect to such wages, and has made no request or demand for the same. Bell v. Bumpus, 63 Mich. 375, 29 N. W. Rep. 862. So also the consent of the father to his son becoming a partner is an implied release of his services. Penn v. Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478. So also a father may impliedly by deed part with his parental right to the services of his infant child, although such deed be not in the form required by the statute for indentures of apprenticeship, and the child is consequently not bound. State v. Barrett, 45 N. H. 15.

Forfeiture.—Forfeiture of the right to a child's earnings rests wholly on the ground of the father's failure to perform the obligations which the law imposes on him in respect to his child. The duty to support and the right to earnings are correlative and the absence of either negatives the existence of the other. Therefore, where a father neglects his obligation to protect, nurture and educate his child, or abandons it, he forfeits his right to its earnings. Godfrey v. Hays, 6 Ala. 501, 41 Am. Dec. 58. Thus, where a father drives from his house his wife and a child three months old, making no provision for their support, and the child at the age of sixteen years returns home at her father's request and is again driven from the house, the father is not entitled to her services during minority. Gary v. Executors, 4 Desaus. (S. Car.) 185. So also, a father, who, when able to support his minor son, forces him to labor abroad for his livelihood, is not entitled to his earnings. Farrell v. Farrell, 3 Houst. (Del.) 633. So also a widow impliedly forfeits her right to her child's services when she remarries and the child is supported by its stepfather. Whitehead v. Railway Co., 22 Mo. App. 60. So also, a minor whose father has abandoned his family, and provides nothing for their support, is entitled to his own earnings, it appearing that his grandfather obtained em-

ployment for him, and that his mother authorized the bargain, but that neither laid any claim to his wages. Clay v. Shirley, 65 N. H. 644, 23 Atl. Rep. 521; Camerlin v. Palmer, 92 Mass. (10 Allen) 539. So also where a decree of divorce awards the custody of a child to the mother, the father, *ipso facto*, forfeits all right to the child's services. Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107. So also an infant husband is entitled to his own wages, so far as they are necessary for the support of himself and his family, even though he married without his father's consent. Commonwealth v. Graham, 157 Mass. 73, 31 N. E. Rep. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255. This decision is evidently based on grounds of public policy rather than on failure of the father to perform his obligations to his child sufficient to work a forfeiture of his rights.

CORRESPONDENCE.

CONSTRUCTION OF PROVISION OF SAFETY APPLIANCE ACT EXEMPTING RAILROAD EMPLOYEES FROM ANY ASSUMPTION OF RISK INVOLVED IN THEIR EMPLOYMENT.

Editor of the Central Law Journal:

As I believe that you are in error in your criticism on the recent case of Schlemmer v. Railroad, 27 Sup. Ct. Rep. 407, I will take the liberty of commenting thereon.

Sec. 8 of the Safety Appliance Act, when it passed the house and came to the senate, read as follows: "That any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed guilty of contributory negligence, although continuing in the employment of such carrier after the habitual use of such locomotive, car or train had been brought to his knowledge."

After some discussion in which the distinction between the doctrines of assumption of the risk and contributory negligence was recognized the act was passed with this section amended by striking out the words contributory negligence, and inserting in place thereof, "shall not be deemed thereby to have assumed the risk thereby occasioned." Congressional Record, Fifty-second Congress, Second Session, Vol. 24, No. 43. So, in my humble judgment, the court was simply carrying out the intention of congress in refusing the defendant the right to plead assumption of risk in disguise (matter of contract) and sending the case to the jury on the defense of contributory negligence (a question of the plaintiff's conduct with knowledge of the existing conditions) in which the court was clearly right on every principle of law and reason, for the defendant created a dangerous condition by their negligent failure to comply with the law, and thereby imposed a dangerous duty on the plaintiff. Had the court decided that the position in which he placed his head was contributory negligence as a matter of law, it would have resulted in the total destruction of the statute as a protection for railway employees, because all courts would be bound by the precedent thus established, and all future decisions would turn on the position in which a party had placed his head, limbs or body, and the logical conclusion would be, that if an employee was killed or injured in handling a defective coupler, that fact alone would bar a recovery.

Similar legislation may be found in many of the state constitutions and statutes and it can be justified by the confusion in this branch of the law of negligence caused by the failure of many of the courts to perceive the correct principle, which I have concluded to be, is, that no employee can assume any risk imposed on him by the master's negligence. To hold otherwise would be imposing on the servant too many implied contracts, and overlooking entirely that the master had failed in his duty.

Juries are by far the most fitted tribunal to judge of the conduct of mankind generally, and their decision either way simply settles one case, and does not impair the rights of other litigants under the same law, for there are many questions which necessarily grow out of the facts of each particular case, which should be referred to the jury, and the fact common to all such cases, where the servant in obedience to the order of his master, incurs the risk of dangerous machinery, where it is reasonably probable that it might be safely used by extraordinary care, is whether or not a man of ordinary prudence would have relied on the judgment of his master. Such was the law (Clarke v. Holmes, 7 Hurst & Nom. Ex. 937), that was lost and found, (Smith v. Baker, House of Lords Appeal Cases (1891), p. 325), and it will prevail "because it is generous in its purposes, in harmony with the best sentiment of a humane people and a progressive government," and appeals strongly to the sense of justice inherent in every human heart.

Charlottesville, Va. W. E. FOWLER.

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE, VOL. 24.

A very important addition to that monumental law book enterprise known as the Cyclopedia of Law and Procedure is the publication, recently issued, of volume twenty-four. This volume contains a treatment of the following subjects of law: Judicial Sales, by Oliver A. Harker; Juries, by James A. Gwyn; Justices of the Peace, by J. Breckinridge Robertson; Kidnaping, by Roger W. Cooley; Labor Unions, by Hon. Alton B. Parker; and Landlord and Tenant, by Donald J. Kiser. The same uniform type of excellence characterizes this as it does previous volumes of this great encyclopedia.

Printed in one volume of 1478 pages and published by the American Law Book Company, New York.

HUMOR OF THE LAW.

A good story is told of John G. Carlisle. Mr. Carlisle was once approached by a well-known member of the New York Bar, a man of most patronizing manner.

"I see, Carlisle," he observed loftily, "that the supreme court has overruled you in in the case of Mullins v, Jenkinson. But," he added, in his grand way, "you, Carlisle, need feel no concern about your reputation."

Carlisle chuckled. "Quite so," he agreed. "I am only concerned for the reputation of the supreme court."

An old colored woman, arrayed in a rusty black dress and a gorgeous purple "picture" hat over which was a black crepe veil, appeared at the court house of a Carolina town not long ago.

"Am yo' de jedge ob reprobates sah?" she asked cautiously opening a crack of the door.

"Yes, I am the judge of probate, aunty; what can I do for you?" was the smiling reply.

"Yassah! T'anky, sah? I'se heah 'cause mah ole man done died detested an' lef' two lil' infidels, an' ah wanter be pinted ter be dere executioner, ef yo' please, sah!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABSTRACTS OF TITLE—Action Against Abstractors.—The allegation, in a complaint against abstractors for furnishing a defective abstract, that they were to furnish a full and complete abstract, held sufficient without an allegation that it was to be made from any particular date.—Hirshiser v. Ward, Nev., 87 Pac. Rep. 174.

2. ACCIDENT INSURANCE—Total Disability.—Total disability in a benefit certificate held inability to carry on the vocation insured was following at the time.—Fogle song v. Modern Brotherhood of America, Mo., 97 S. W. Rep. 240.

3. ACTION—Estoppel.—Interpleaders having sued for specific performance of a bond for title in 1883, and having failed to claim the land in controversy in that suit, were estopped, more than 15 years thereafter, to assert title to the land under the bond.—Cornett v. Moore, Ky., 97 S. W. Rep. 380.

4. ACTION—To Restrain Taking Photograph of Accused.—An action to enjoin the chief of police from taking a picture of plaintiff and exposing the same in the Rogues' Gallery is not an action to punish an infraction of the criminal laws.—Schulman v. Whitaker, La., 42 So. Rep. 227.

5. ANIMALS—Knowledge of Viciousness.—The owner of a dog is not liable for injuries inflicted by it upon a person who had cared for it for nearly four months, where the owner's knowledge of the dog's viciousness was limited to its propensity to attack strangers.—Emmons v. Stevane, N. J., 64 Atl. Rep. 1014.

6. APPEAL AND ERROR—Directed Verdict.—On a motion to direct a verdict for variance, the only question reviewable on appeal is whether the evidence fairly tends to support the declaration.—Chicago Union Traction Co. v. Brethauer, Ill., 79 N. E. Rep. 287.

7. APPEAL AND ERROR—Discretion of Trial Court.—The supreme court will not review the action of the trial court on an application for a rehearing on the ground of surprise and newly discovered evidence relative thereto, unless an abuse of discretion appears.—Saginaw Suburban R. Co. v. Connelly, Mich., 109 N. W. Rep. 677.

8. APPEAL AND ERROR—Filing Schedule.—The filing of a schedule more than 90 days after the granting of an appeal held no ground for dismissal where a complete transcript of the record is filed in due season.—Grubbs v. Fish, Ky., 97 S. W. Rep. 358.

9. APPEAL AND ERROR—Harmless Error.—Plaintiff, having proved by evidence unobjected to that defendant took part in the organization of a certain corporation, defendant was not prejudiced by the alleged erroneous admission of copies of certain telegrams offered to prove the same fact.—Critchfield v. Julia, U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 65.

10. APPEAL AND ERROR—Judgment at Law.—A judgment in an action at law in a federal court is not reviewable by appeal, and an attempted appeal in such case does not give the appellate court jurisdiction.—United States v. Fidelity & Deposit Co., of Maryland, U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 228.

11. APPEAL AND ERROR—Reversal.—The exclusion of evidence technically relevant is not ground for reversal where the same facts were proved by the same witness without objection.—Strickland v. Phillips, S. Car., 55 S. E. Rep. 453.

12. APPEAL AND ERROR—Review.—Where a new trial has been properly refused, on appeal therefrom it must be shown that the rulings to which exception was taken were erroneous, and that the appellant has suffered prejudice by such erroneous rulings.—Reed v. Southern Ry., Carolina Division, S. Car., 55 S. E. Rep. 218.

13. APPEAL AND ERROR—Specification of Error.—A specification of error to the admission of a deed in evidence cannot be reviewed, where the record fails to show the grounds of objection made when the deed was offered in evidence, and it is not admissible for every purpose.—Jones v. Deardorff, Cal., 87 Pac. Rep. 213.

14. APPEAL AND ERROR—Sufficiency of Evidence.—In an action on a contract for services of an attorney, testimony as to an alleged verbal contract does not preponderate against the evidence of the defendant and another interested witness, neither of whom were impeached.—Lazarus v. Friedrichs, La., 42 So. Rep. 230.

15. ARREST — Photographing Accused. — Taking the picture of a person accused of crime will be postponed until he is convicted, unless for the purposes of identification or for detection of the crime.—Itzkovitch v. Whitaker, La., 42 So. Rep. 228.

16. ATTACHMENT — Negligence of Officer.—Where an attachment was levied on a horse, and it died while in the possession of the sheriff, owing to his negligence, plaintiff was not liable unless the attachment was wrongfully sued out.—McFaddin v. Sims, Tex., 97 S. W. Rep. 835.

17. ASSIGNMENTS—Notice.—As between an assignee of a fund under an equitable assignment, and the receiver of the assignor, an insolvent corporation, notice to the debtor or holder of the fund is not necessary to protect the title of the assignee.—Cogan v. Conover Mfg. Co., N. J., 64 Atl. Rep. 978.

18. BAILMENT—Nontransferable Mileage Book.—Where plaintiff obtained possession of mileage book from defendant for use and return, plaintiff was estopped to claim that he was under no obligation to return the book because defendant was not the original purchaser.—Cook v. Bartlett, 100 N. Y. Supp. 1032.

19. BANKRUPTCY—Effect on Landlord's Lien.—Where a landlord has seized movables of his tenant on bringing suit for rent, and before judgment the tenant is adjudicated a bankrupt and his trustee makes himself a party, he cannot insist that the suit should be dismissed and property turned over to him.—Schall v. Kinsella, La., 42 So. Rep. 221.

20. BANKRUPTCY—Exemptions.—Under the statute of Washington (Laws 1901, p. 222, ch. 109, Ballinger's Code Supp. § 3102, Pierce's Code, § 5846, which, in case of a sale in bulk of a stock of merchandise, makes the purchaser responsible for the application of the purchase price on the seller's debts, the seller, by making such a sale, must be deemed to have assented to such application and, on his adjudication as a bankrupt, cannot claim his statutory exemptions out of the money due from the purchaser. Nor do the creditors waive their rights in such fund by instituting involuntary proceedings in bankruptcy against him.—*In re* Connor, U. S D. C., W. D. Wash., 146 Fed. Rep

21. BANKRUPTCY—Homestead.—A homestead interest of a bankrupt and his wife, not exceeding in value the sum of $1,000, held not subject to the claims of creditors.—Daughters v. Christy, Ill., 79 N. E. Rep. 292.

22. BANKRUPTCY — Involuntary Petition. — Creditors who have joined in a petition in involuntary bankruptcy against a debtor are not entitled to withdraw without the consent of all when the effect would be to require a dismissal of the proceedings.—*In re* Quincy Granite Quarries Co., U. S. D. C., D. Mass., 147 Fed. Rep. 279.

23. BANKRUPTCY—Secured Debt.—A creditor, holding as security a lease running to his debtor who on its expiration obtained its renewal to himself without the debtor's knowledge, holds the renewal merely as security the same as the original lease, and can only prove his debt in bankruptcy as a secured claim.—Fitch v. Richardson, U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 197.

24. BANKRUPTCY—Submissions of Issues to Jury.—The submission of issues in a bankruptcy proceeding to a jury independent of Bankr. Act July 1, 1898, ch. 541, § 19a, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], is within the discretion of the judge of the bankruptcy court, and the verdict is purely advisory.—*In re* Neasmith, U. S. C. C. of App., Sixth Circuit, 147 Fed. Rep. 160.

25. BANKS AND BANKING—Pass Book as Evidence of Title to Deposit.—Circumstances surrounding the possession of a pass book of savings account held not to warrant a holding that the book was out of the possession of one claiming the fund.—Carlin v. Carlin, N. J., 64 Atl. Rep. 1018.

26. BILLS AND NOTES—Burden of Showing Bona Fides.—A purchaser of an accepted draft obtained by the fraud of the drawer has the burden of proving that he is a *bona fide* holder.—Stouffer v. Fletcher, Mich., 109 N. W. Rep. 684.

27. BILLS AND NOTES—Indorsement in Blank.—Indorsement by payee of note held in legal effect one in blank, and not one making her a principal maker.—Kistner v. Peters, Ill., 79 N. E. Rep. 311.

28. BILLS AND NOTES—Transfer of Note.—The maker of a note held not charged with knowledge of its subsequent sale by the payee, so as to render demurrable an answer in an action on the note denying knowledge or information as to such facts.—Geo. Alexander & Co. v. Hazelrigg, Ky., 97 S. W. Rep. 253.

29. BROKERS—Contract.—Where A, without any employment by its owner exhibits a house to one seeking a tenement, who rents directly from the owner, a promise by the owner thereafter to pay A for his services is without consideration.—Sharp v. Hoopes, N. J., 64 Atl. Rep. 984.

30. CANCELLATION OF INSTRUMENTS—Conditions Precedent.—In a suit to set aside a conveyance, a tender to restore to defendant the property given by him in consideration for the conveyance held sufficient.—Owings v. Turner, Oreg., 87 Pac. Rep. 160.

31. CARRIERS—Care Required of Stage Coach Driver.—Where the driver of a coach approaches a place of particular danger to passengers, he is bound to warn them of the nature of the danger.—Dinnigan v. Peterson, Cal., 87 Pac. Rep. 218.

32. CARRIERS—Ejection of Passenger.—Where plaintiff was forcibly ejected from defendant's train, in an action for injuries sustained, it was not necessary to prove that the car was moving at the rate of speed alleged, or any other rate of speed.—Chicago Union Traction Co. v. Brethauer, Ill., 79 N. E. Rep. 287.

33. CARRIERS—Injury to Baggage of a Passenger With Pass —Person traveling on pass, providing that railroad should not be liable for injury to baggage, could not recover except for willful misconduct.—Hutto v. Southern Ry. Co., S. Car., 55 S. E. Rep. 445.

34. CERTIORARI—Appeal from Justice Court.—A party desiring to attack an appeal from a justice, on the ground that no undertaking had been filed, held not required to wait until after the expiration of the time prescribed by statute for taking certain steps to an appeal.—Hoffman v. Lewis, Utah, 87 Pac. Rap. 167.

35. CHARITIES—Diversion of Fund.—Giving balance of fund raised for relief of sufferers of the General Slocum disaster to the church giving the excursion held a diversion from the original purpose of the trust.—Loch v. Mayer, 100 N. Y. Supp. 837.

36. COMMERCE—Intoxicating Liquors.—That Act Aug. 10, 1906, fixing the license fee for the sale of liquors in Irwin county, discriminates against wines made outside of state, does not render the act invalid, but places all wines on the same basis, whether made within or without the state.—Glover v. State, Ga., 55 S. E. Rep. 592.

37. COMMERCE—License Laws.—Sales of drugs and patent medicines held to constitute interstate commerce, and therefore were not within Revisal 1905, § 5150, 5151, prohibiting a sale of patent medicines or drugs without the seller first having obtained a license.—State v. Trotman, N. Car., 55 S. E. Rep. 599.

38. COMMERCE—Running Freight Trains on Sunday.—Penal Code 1895, § 420, forbidding, with certain exceptions, the running of freight trains on Sunday, is not unconstitutional as a violation of interstate commerce.—Scale v. State, Ga., 55 S. E. Rep. 472.

39. CONSTITUTIONAL LAW—Employers' Liability Act.—Employers' Liability Act 1893, held not unconstitutional as impairing the obligation of contract in so far as it applies to a cause of action for injuries to a servant continuously employed from a date long prior to the passage of the act and injured after it took effect.—Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser, Ind., 78 N. E. Rep. 1033.

40. CONSTITUTIONAL LAW—Impairment of Contract.—The power to alter or repeal general laws under which corporations have been organized reserved by Const. Neb., art. 11b [13], § 1, is limited by art. 1, sec. 16, relating to the impairment of contracts.—Omaha Water Co. v. City of Omaha, U. S. C. C. of App., Eighth Circuit, 147 Fed. Rep. 1.

41. CONSTITUTIONAL LAW—Legislative Powers.—Act February 18, 1879 (P. L. 1879, p. 27), providing for the summary investigation of county and municipal expenditures, as amended by the supplement March 28, 1898 (P. L. 1898, p. 155), is not unconstitutional as investing a justice of the supreme court with powers not judicial and which are legislative in their character.—City of Hoboken v. O'Neill, N. J., 64 Atl. Rep. 981.

42. CONSTITUTIONAL LAW—Statutes Regulating Admission of Attorneys to Practice.—Revisal 1905, §§ 207, 208, relating to the admission of attorneys, held not in violation of Const., art. 4, § 12, which provides that the general assembly shall not deprive the judicial department of any power which rightfully pertains to it.—*In re* Applicants for License, N. Car., 55 S. E. Rep. 685.

43. CONTRACTS—Carriers.—A contract made by a railroad company to secure the building up of a traffic

its road in a new commodity considered and held not *ultra vires* nor void as against public policy.—Delaware, L. & W. R. Co. v. Kutter, U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 51.

44. CONTRACTS—Damages for Breach.—Where defendant repudiated a contract for advertising before it was completed, plaintiff was limted to a recovery of expenses already incurred and the profit it would have made.—Official Catalogue Co. v. American Car & Foundry Co., Mo., 97 S. W Rep. 231.

45. COPYRIGHTS—Musical Composition.—A copyright of a musical composition printed with staff notation is not infringed by a perforated record or sheet designed for use with mechanism to play the composition on a musical instrument.—White-Smith Music Pub. Co. v. Apollo Co., U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 226.

46. CORPORATIONS — Destruction of Business. — One, whose stock in a corporation has been sold as collateral to another's note, held not entitled to maintain an action for the destruction of the corporation's business by the payee, prior to the sale of the stock.—Dudley v. Armenia Ins. Co., 100 N. Y. Supp. 818.

47. CORPORATIONS—Invalid Issue of Stock.—One who participates as a stockholder and officer in an improper issuance of stock certificates marked "full paid" held not estopped from enforcing against the stockholders any just claims he may have as a creditor of the company; the agreement as to the issue of the stock being absolutely void.—Easton Nat. Bank v. American Brick & Tile Co., N. J., 64 Atl. Rep. 917.

48. CORPORATIONS—Payment in Stock.—Where services rendered a corporation by an agent have been legally compensated by the issuance of stock, the subsequent increase in value and accruing dividends belong to the person so compensated. — Rosehill Cemetery Co. v. Dempster, Ill., 79 N. E. Rep. 376.

49. CORPORATIONS—Purchasing Stock of Another Corporation.—A corporation, purchasing stock of another corporation, held required to make a *bona fide* appraisal of the actual value of the stock purchased at a sum not less than the stock issued in payment thereof, together with the cash payment. — Strickland v. National Salt Co., N. J., 64 Atl. Rep. 982.

50. CORPORATIONS—Salary of Officer.—The president of a corporation whose salary under the by-laws was to be fixed annually by the stockholders, held entitled to recover on a *quantum meruit* for services during certain years when no stockholders' meetings were held.—Metropolitan Rubber Co. v. Place, U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 90.

51. COSTS—On Appeal.—The supreme court will not tax costs against the appellee for insertion on his direction by transcript of the record of papers having a material bearing on the questions presented.—Reid v. Southern Development Co., Fla , 42 So. Rep. 206.

52. COURTS—Jurisdiction.—It is too late, after verdict, to question the jurisdiction of a court which was competent to deal with the subject-matter of a suit against a corporation which voluntarily appeared and made defense.—Southern Express Co. v. B. R. Electric Co., Ga., 55 S. E. Rep. 254.

53. CRIMINAL TRIAL—Assignment of Error.—An assignment of error in these words, "because the court erred in confining the word 'aggression' to an assault," etc., is fatally defective in not setting forth the charge wherein the word was used.—Beaudrot v. State, Ga., 55 S. E. Rep. 592.

54. CRIMINAL TRIAL—Bill of Exceptions. — Affidavits setting forth the grounds of the objection of one charged with crime, to the appointment of a special judge, not brought into the record by bill of exceptions, will be disregarded on appeal.—Juliana v. State, Ind., 79 N. E. Rep. 359.

55. CRIMINAL TRIAL—Conviction of Lesser Offense.—Where a conviction of murder in the second degree under an indictment charging murder in the first degree, is set aside, accused on a subsequent trial, may be tried for murder in the first degree.—State v. Matthews, N. Car., 55 S. E. Rep. 342.

56. CRIMINAL TRIAL—Exceptions Before Sentence.—The supreme court cannot consider on exceptions before sentence a conviction for the violation of a city ordinance.—City of Muskegon v. Hanes, Mich., 109 N.W. Rep. 674.

57. CRIMINAL TRIAL—Forms of Verdict.—Where the presiding judge fully instructed as to the law of the case, and as to the forms of verdict, there was no error in allowing the jury to carry out with them written forms of verdicts.—Park v. State, Ga., 55 S. E. Rep. 489.

58. CRIMINAL TRIAL—Instructions.—An instruction that there is nothing that the jury has to consider except the law and the evidence, and the statement of defendant held not too restrictive —Moss v. State, Ga., 55 S. E. Rep. 481.

59. CRIMINAL TRIAL — Instruction as to Reasonable Doubt.—Where the trial judge has once correctly defined reasonable doubt, it is not necessary that he should repeat such instructions in connection with each new proposition laid down.—Goodin v. State, Ga., 55 S. E. Rep. 503.

60. CRIMINAL TRIAL—Instructions that Invade Jury's Province.—An instruction intimating that "prominent and striking" contradictions in the stories of different witnesses should be attributed to deliberate perjury is an invasion of the jury's province.—State v. Allen, Mont., 87 Pac. Rep. 177.

61. CRIMINAL TRIAL—Jury.—An objection to a juror that his name does not appear in the jury box must be made when the juror is put upon the accused.—Wall v. State, Ga., 55 S. E. Rep. 484.

62. CRIMINAL TRIAL—Motion in Vacation.—Where a motion for new trial was made in vacation, and erroneous judgment was entered upon it, it will be reversed, and direction given that the motion itself, and the action of the judge thereon, be treated as a nullity.—Perkins v. State, Ga., 55 S. E. Rep. 501.

63. CRIMINAL TRIAL—Relationship of Juror to Accused.—A new trial will not be granted because of relationship within the prohibited degrees of a juror to the accused, though such relationship was unknown to the accused or his counsel until after verdict.—McCrimmon v. State, Ga., 55 S. E. Rep. 481.

64. CRIMINAL TRIAL—Testimony from Private Record.—In a prosecution for burglary it was not error to admit a record in evidence prior to a foundation being laid, on the district attorney stating that he intended to prove that the book was a book of original entry by the testimony of a specified witness who made the entries.—People v. Lowrie, Cal., 87 Pac. Rep. 253.

65. DAMAGES—Breach of Contract.—Where defendant agreed to pay plaintiff certain preferred stock in a corporation to be formed, but purposely refrained from issuing such stock, plaintiff was entitled to recover the value of the stock, to be determined from the value of the corporation's assets and activities.—Crichfield v. Julia, U. S. C. C. of App., Second Circut, 147 Fed. Rep. 65.

66. DAMAGES—Breach of Contract.—Where compensation is to be made in some other thing than money, and there is a refusal to comply with the agreement, plaintiff can recover as compensation what the specific thing which he was to receive is worth.—Ware v. McMurray, N. J., 64 Atl. Rep. 987.

67. DAMAGES — Duty to Mitigate.—Where plaintiff's property was injured by defendant's negligence, that plaintiff's negligence contributed to increase the damages was no defense, but only available in mitigation of damages.—Cromer v. City of Logansport, Ind., 78 N. E. Rep. 1045.

68. DAMAGES— Eminent Domain. — Where an assessment for land taken for a highway was made without notice to the township trustees or county commissioners,

and they appealed from the award, it was prope: for the court either to try the matter or remand it to the clerk for a new assessment.—*In re* Wittkowsky's Land, N. Car., 55 S. E. Rep. 617.

69. DAMAGES—Life Expectancy.—Where, in an action by a husband for loss of his wife's services, there was no great disparity in their ages, an instruction basing the husband's right to recovery on the wife's expectancy, etc., without reference to his expectancy, held not error. —Croft v. Chicago, R. & I. P. Ry. Co., Iowa, 109 N. W. Rep. 723.

70. DEPOSITIONS—Notice as to Time and Place.—Where notice to take depositions provided for the taking in two different places at the same time, and the party notified appeared and cross-examined the witness at one place without objection to the notice, such objection was waived.—Ivey v. Bessemer City Cotton Mills, N. Car., 55 S. E. Rep. 613.

71. DESCENT AND DISTRIBUTION—Child of White Man and Indian Woman.—A child of the marriage of an Indian woman and a white man, who was a citizen of the United States, inherits from the father under the laws of the state.—Pourier v. McKinzie, U. S. C. C., D. Mont., 147 Fed. Rep. 287.

72. DIVORCE—Desertion.—Where the original separation of husband and wife was not shown to amount to a desertion, the continuance of the separation did not entitle the wife to a divorce.—Sharp v. Sharp, N. J., 64 Atl. Rep. 985.

73. DIVORCE—Intervention by Third Party —A certain person held not entitled under the facts to intervene and oppose a motion by plaintiff to set aside a decree invalidating her marriage to defendant.—Johnson v. Johnson, N. Car., 55 S. E. Rep. 341.

74. DOWER — Inchoate Interest. — A construction of Burns' Ann. St. 1901, § 2669, Act March 11, 1875, p. 178, ch. 123, § 1, whereby the wife's inchoate dower vests as against her husband on the judicial sale of his interest in property, held not to render it invalid as a deprivation of his property.—Green v. Estabrook, Ind., 79 N. E. Rep. 373.

75. EASEMENTS — Irrigation.—A right of way for an irrigation ditch and the right to receive water from or discharge the same on land constitute easements which may attach to other land as incidents or appurtenances. —Jones v. Deardorff, Cal., 87 Pac. Rep. 218.

76. EJECTMENT—Damages.—In ejectment, held that certain sums should have been allowed defendant in finding the value of the use and occupation under Code Civ. Proc. § 1531.—Fagan v. McDonnell, 100 N. Y. Supp. 641.

77. EJECTMENT—Interest on Rents and Profits.—Where, in ejectment, it appeared that defendant had paid interest on a mortgage executed on the property by plaintiff, defendant was entitled to be reimbursed the interest so paid. Code Civ. Proc. § 1531.—Fagan v. McDonnell, 100 N. Y. Supp. 641.

78. ELECTION OF REMEDIES — What Constitutes.—The rule that adoption of one or more inconsistent remedies is a conclusive bar to the alternative remedy does not apply if in reality the party had only one remedy.—Clark v. Heath, Me., 64 Atl. Rep. 913.

79. EMBEZZLEMENT — Indictment —In a prosecution for embezzlement, an allegation that defendant as such employee had control and possession of the money embezzled held insufficient to show that defendant had possession by virtue of his employment.—Vinnedge v. State, Ind., 79 N. E. Rep. 353.

80. EVIDENCE — Acts of Drainage Commissioners.— Where drainage commissioners acted as agents of adjoining property owners, and not in their official capacity, in the settlement of a dispute, their acts were provable by parol.—Dunn v. Youmans, Ill., 79 N. E. Rep. 321.

81. EVIDENCE—Consideration for Deed.—A deed from a father to his daughter in consideration of love and affection cannot be supported against a claimant under previous contract of sale from the father by evidence of a different consideration.—Lawson v. Mullinix, Md., 64 Atl. Rep. 988.

82. EVIDENCE—Conversion.—In an action by a principal, consigning goods to a factor with authority to sell or reconsign, for conversion, based on a third person reconsigning the goods, certain evidence held incompetent as hearsay.—Smith v. Jefferson Bank, Mo., 97 S. W. Rep. 247.

83. EVIDENCE—Declarations by Third Persons.—Statements by a third person as to what defendant would do to certain persons held properly admitted over objection that defendant did not hear them; it appearing that he afterwards made practically the same statements.—State v. White, Oreg., 87 Pac. Rep. 137.

84. EVIDENCE—Laws of Nature.—Courts will take judicial notice of the effect of the flood waters of a stream turned at right angles to the land of a riparian proprietor.—Morton v. Oregon Short Line Ry. Co., Oreg., 87 Pac. Rep. 151.

85. EVIDENCE—Photographs.—Photographs of a place, if admitted in evidence, are but secondary evidence of the conditions existing at the time they were taken, and are not admissible, if objected to, without preliminary proof that they are correct and truthful representations of their originals.—Porter v. Buckley, U. S. C. C. of App., Third Circuit, 147 Fed. Rep. 140.

86. EVIDENCE—Telegrams.—In an action by a broker against a customer to recover an amount due on a sale and purchase of cotton, certain telegrams held competent to show that a *bona fide* sale and purchase was contemplated.—Overbeck, Starr & Cooke Co. v. Roberts, Oreg., 87 Pac. Rep. 158.

87. EXECUTORS AND ADMINISTRATORS—Attorney's Fees —An executor held not entitled to charge for attorney's fees in resisting an application of the widow for an extension of time within which she might elect to accept a devise under the will in lieu of dower in lands in a foreign state, in which application the estate had no interest.—*In re* Flaacke's Estate, N. J., 64 Atl. Rep. 1020.

88. EXECUTORS AND ADMINISTRATORS—Removal.—Administrator duly removed has no *locus standi* as administrator to file a bill to have the estate administered in equity.—Milton v. Hundley, Fla., 42 So. Rep. 185.

89. FACTORS—Right to Delegate Authority.—A factor with authority to sell or reconsign goods consigned to him by his principal has no authority to delegate to another the authority to sell or reconsign the goods, without the principal's knowledge and consent.—Smith v. Jefferson Bank, Mo., 97 S. W. Rep. 247.

90. FINES—Infants.—A minor who has arrived at the age of criminal responsibility may be convicted under the Act of 1903, of fraud though his contract of service was not civilly enforceable.—Anthony v. State, Ga., 55 S. E. Rep. 479.

91. FINES—Reasonable Time to Pay.— When a misdemeanor convict is sentenced in the alternative, to the chain gang, and to be discharged on payment of a fine, it is the duty of the court to prescribe a reasonable time within which to pay the fine.—Dunaway v. Hodge, Ga., 55 S. E. Rep. 483.

92. FRAUDS, STATUTE OF—Authority to Make Memorandum.—There is no statute requiring the authority to make the memorandum required by the statute of frauds to be in writing —Brandon v. Pritchett, Ga., 55 S. E. Rep. 241.

93. FRAUDS, STATUTE OF—Contract of Employment.— A contract of employment for a year to begin *in præsenti* is not within the statute of frauds.—Hudgins v. State Ga., 55 S. E. Rep. 492.

94. FRAUDS, STATUTE OF—Contract Relating to Land.— An agreement that a deed conveying land shall operate as a mortgage to secure a debt is not within the statute of frauds.—De Bartlett v. De Wilson, Fla., 42 So. Rep. 189.

95. FRAUDULENT CONVEYANCES—Husband and Wife. —A deed from a husband to his wife held to preclude setting aside as fraudulent against the husband's creditors a subsequent deed executed by the husband and wife.—Mishler v. Finch, Me., 64 Atl. Rep 945.

96. GAMING—Burden of Proving Gambling Transaction.—In an action by a broker against a customer to recover an amount due plaintiff on transactions for defendant on stock exchanges, the burden of proving that the transactions were a mere cover for differences was on defendant.—Overbeck, Starr & Cooke Co. v. Roberts, Oreg., 87 Pac. Rep. 158.

97. GOOD WILL—Elements.—The value of the good will of a manufacturing company held fairly arrived at by multiplying the average net profits by a number of years having reference to the nature and character of the business.—Von Au v. Magenheimer, 100 N. Y. Supp. 659.

98. GUARDIAN AND WARD—Authority to Sue.—Where a guardian was appointed on removal of another, and the estate was committed to him without his giving the statutory bond, his prosecution of suits for recovery of money of wards was not void.—Havens v. Ahlering, Ky., 97 S. W. Rep. 344.

99. HEALTH—Regulation of Sale of Milk.—Board of health illegally interfering with the carrying on of the business of selling milk, held subject to the same liabilities as an individual.—People v. Department of Health of City of New York, 100 N. Y. Supp. 788.

100. HOMICIDE—Murder.—Proof that a murder was intentionally done by poison, lying in wait, etc., held to raise the presumption of murder in the first degree.—State v. Matthews, N. Car., 55 S. E. Rep. 842.

101. HOMICIDE—Self Defense.—In order to justify a killing on the ground of self defense, the danger must have existed or reasonably appeared to exist at the very time defendant fired the fatal shot.—People v. Taylor, Cal., 87 Pac. Rep. 215.

102. HOMICIDE—Self-Defense.—Where a homicide was committed by the use of the fist alone, without a weapon, the defendant's right to justify the act as having been committed in self-defense, was not confined to a situation so grave that the danger to be averted was great bodily injury or the loss of life.—Weston v. State, Ind., 78 N. E. Rep. 1014.

103. HUSBAND AND WIFE—Medical Bills.—Where a wife became personally liable for medical treatment to obtain relief from injuries sustained through defendant's negligence, she was entitled to recover for such treatment as an element of her damages.—Indianapolis Traction & Terminal Co. v. Kidd, Ind., 79 N. E. Rep. 847.

104. HUSBAND AND WIFE—Torts of Wife.—The common-law rule that a tort committed by the wife in the presence of her husband is presumed to be the result of coercion on his part, and his coercion excuses her from liability, prevails in New Jersey.—Emmons v. Stevane, N. J., 64 Atl. Rep. 1014.

105. INDICTMENT AND INFORMATION—Motion to Quash.—The proper method for attacking an indictment as defective in that the crime was committed in another county is by a plea in abatement rather than a motion to quash.—State v. Lewis, N. Car., 55 S. E. Rep. 600.

106. INFANTS—Mortgage Under Order of Court.—The court authorizing the execution of a mortgage of real estate to protect the interests of an infant remainderman therein held entitled to direct that delinquent taxes be paid out of the money raised by the mortgage.—*In re* Lueft, Wis., 109 N. W. Rep 652.

107. INJUNCTION—Damages in Action on Bond.—Attorney's fees paid to obtain the dissolution of a temporary restraining order held not a proper element of damages in an action on the bond.—Sullivan v. Cartier, U. S. C. C. of App., Ninth Circuit, 147 Fed. Rep. 222.

108. INTERPLEADER—Grounds of Relief—A bill of interpleader against certain banks, a firm, and a third person, held not maintainable where its effect was to restrain the firm from prosecuting suits against the banks on contracts and to compel it to sue plaintiff for tort.—Rauch v. Ft. Dearborn Nat. Bank, Ill., 79 N. E. Rep. 273.

109. JUSTICES OF THE PEACE—Approval of Bond.—To sustain the approval of a justice's bond by a judge of the superior court held it is proper to presume that when presented to him it was accompanied with an affidavit authorizing the approval.—Guiberson v. Argabrite, Cal., 87 Pac. Rep. 226.

110. JUDGMENT—Collateral Attack.—A proceeding by a nonresident heir to vacate an order approving the executor's report and discharging the executor is not a collateral attack thereon.—Reizer v. Mertz, Ill., 79 N. E. Rep. 283.

111. JUDGMENT—Full Faith and Credit.—A judgment of the Supreme Court of the United States that a policy of fire insurance could not be recovered upon it as it stood held not denied full faith and credit by an adjudication that it is not a bar to a suit to reform the policy.—Northern Assur. Co. v. Grand View Bldg. Ass'n, U. S. S. C., 27 Sup. Ct. Rep. 27.

112. JUDGMENT—Necessity of Revival.—An equitable petition which seeks to subject property to the payment of a dormant judgment, without any revival of the judgment and without suing upon it, is properly dismissed.—Palmer v. Inman, Ga., 55 S. E. Rep. 229.

113. JUDGMENT—Persons Concluded.—Decree by a Massachusetts court in a suit continued against the administrator of the defendant dying pending the suit held not binding on the executor of deceased defendant appointed by a court in Michigan.—Brown v. Fletcher's Estate, Mich., 109 N. W. Rep. 686.

114. JUDGMENT—Res Judicata.—A decision in a suit to establish the ownership of corporate stock held *res judicata* in a subsequent suit involving the question of the right to vote the stock.—Leigh v. National Hollow Brake-Beam Co., Ill., 79 N. E. Rep. 818.

115. LANDLORD AND TENANT—Damages for Leaky Roof.—A landlord held liable for damages to a tenant by leaky roof.—Pratt, Hurst & Co. v. Tailer, N. Y., 79 N. E. Rep. 828.

116 LEASE—Contract to Repair.—A lease containing a covenant on the part of the landlord as to repairs held only to require the landlord to furnish materials for repairs and one man's labor when called on by the tenant to do so.—Brett v. Berger, Cal., 87 Pac. Rep. 222.

117. LIBEL AND SLANDER—Special Damage.—Defamatory language is not actionable when merely in disparagement of one's property, or the quality of the articles which he manufactures or sells, unless it occasions special damage.—Victor Safe & Lock Co. v. Derr ght, U. S. C. C. of App., Eighth Circuit, 147 Fed. Rep. 211.

118. LIFE ESTATES—Improvements by Life Tenant.—A grantee of a life estate held not entitled to charge the estate in remainder with the value of improvements erected on the land in good faith, on the belief that he had title to the property in fee.—Robison v. Gray, Ky., 97 S. W. Rep. 347.

119. LIFE INSURANCE—Authority of General Agent.—A general agent of a life insurance company can waive the condition in a policy that it shall not become effective unless the first premium is paid during the continued good health of the insured.—Germania Life Ins. Co. v. Lauer, Ky., 97 S. W. Rep. 368.

120. LIMITATION OF ACTIONS—Part Payment by Guarantor.—Payment by a guarantor of a claim barred against the principal held not to revive against the principal barred claims for payments theretofore made by the guarantor.—Thompson & Thompson v. Brown, Mo., 97 S. W. Rep. 242.

121. MANDAMUS—Appeal From Justice Court.—*Mandamus* held the proper remedy to compel the district court to proceed with a case appealed from justice's court, where it erroneously dismisses the appeal, since Const. art. 8, § 9, prevents an appeal, and since *certiorari* gives no relief—Hoffman v. Lewis, Utah, 87 Pac. Rep. 167.

122. MASTER AND SERVANT—Assumed Risk.—The doctrine of assumed risk held not available as a defense in an action against a railroad company for injuries to a servant by the negligence of the operator of a locomotive under employers' liability act (Burns' Ann. St. 1901, § 7083, subd. 4).—Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser, Ind., 78 N. E. Rep. 1033.

123. MASTER AND SERVANT—Assumption of Risk.—An employee injured by his hand being drawn between the rolls of a machine held to have assumed the risk from the absence of a clutch which would have stopped the rolls.—Roche v. India Rubber & Gutta Percha Insulating Co., 100 N. Y. Supp. 1009.

124. MASTER AND SERVANT—Assumed Risk.—An employee who has worked with a machine and knows about its construction assumes the risk arising from a want of a guard.—United States Wind Engine & Pump Co. v. Butcher, Ill., 79 N. E. Rep. 304.

125. MASER AND SERVANT—Defective Machinery.—An employee, suing for injuries caused by a defect in a machine, held required to show that the promise of a fellow servant to repair the machine was made on the authority of the employer.—Spencer v. Haines, N. J., 64 Atl. Rep. 970.

126. MASTER AND SERVANT—Fellow Servants.—A member of a railroad construction gang held a fellow servant of the engineer operating the plow which cleaned the cars.—Bradford Construction Co. v. Heflin, Miss., 42 So. Rep. 174.

127. MASTER AND SERVANT—Infants.—That the minor told his employer that he had yielded to the command of a stranger to go to work for him, is no excuse in the absence of a showing that he did so under fear of duress rather than with the purpose of defrauding his employer in accordance with a previously formed intent.—Anthony v. State, Ga., 55 S. E. Rep. 479.

128. MASTER AND SERVANT—Liability for Tort of Servant.—A railway company was not liable for an assault committed by the chief clerk in one of its offices three days after a dispute as to the employer's business between such clerk and the person assaulted.—Alabama & V. Ry. Co. v. Harz, Miss., 42 So. Rep. 201.

129. MASTER AND SERVANT—Look and Listen Rule.—The "look and listen rule," applicable to travelers at railroad crossings does not apply in all its strictness to railroad employees required to remain on or about the track.—Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser, Ind., 78 N. E. Rep. 1033.

130. MASTER AND SERVANT—Safe Place to Work.—The rule which requires the master to use reasonable diligence to furnish a reasonably safe place for his employees to work has no application to those whose duty it is to make dangerous places safe.—Kellyville Coal Co. v. Bruzas, Ill., 79 N. E. Rep. 309.

131. MINES AND MINERALS—Description of Claim.—Where a location notice described a mining claim as lying about a mile from Anvil Mountain in a southeasterly direction, it was not fatally defective for failure to point out a particular portion of such mountain as the beginning point.—Vogel v. Warsing, U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep. 949.

132. MORTGAGES—Impairment of Lien.—The cause of action arising on the impairment of the lien of a mortgage of realty held to be a tort requiring a wrongful purpose to impair the lien.—Jackson v. Brandon Realty Co., 100 N. Y. Supp. 1005.

133. MORTGAGES—Priority Among Mortgage Notes.—Where D purchases land in his own name, but as the agent of his wife and gives his own notes, due 6, 12 and 18 months thereafter, secured by mortgage and D's wife promises to pay the first two notes before maturity, on assignment to her, and the notes are assigned, on foreclosure D's wife being the actual purchaser of the property, is not entitled to have the notes assigned to her given priority over the notes held by the vendor.—Polk County Nat. Bank v. Darrah, Fla., 42 So. Rep. 323.

134. MORTGAGES—Void Foreclosure.—A mortgagee taking possession under void foreclosure as against the holder of the legal title, held entitled to possession until the payment of his debt, though barred by limitations.—Burns v. Hiatt, Cal., 87 Pac. Rep. 196.

135. MORTGAGES—Void Foreclosure.—In an equitable action to redeem real estate from void foreclosure sale, the holder of a void judgment lien on the land is not a necessary party.—Kelso v. Norton, Kan., 87 Pac. Rep. 184.

136. MUNICIPAL CORPORATIONS—Ordinances.—Ordinance making misdemeanors under state laws violations of municipal laws held not violative of Ann. Code 1892, § 3008, relating to subjects and titles of ordinances.—Winfield v. City of Jackson, Miss., 42 So. Rep. 183.

137. MUNICIPAL CORPORATIONS—Public Water Supply.—The legislature unless prohibited by its constitution, may empower a city to suspend by contract, and the city may suspend in that way for a reasonable term its power to regulate the rates which a water company may collect of private consumers.—Omaha Water Co. v. City of Omaha, U. S. C. C. of App., Eighth Circuit, 147 Fed. Rep. 1.

138. MUNICIPAL CORPORATIONS—Variance Between Ordinance and Recommendation of Board.—That ordinance for sidewalks excepted roadways and railroad rights of way held not a variance from recommendation of board o local improvements.—Gage v. City of Chicago, Ill., 79 N. E. Rep. 294.

139. MUNICIPAL CORPORATIONS—Violation of Ordinance.—In a prosecution for violation of a municipal ordinance the testimony as to its violation must be restricted to the time after which the ordinance went into effect.—Bell v. City of Forsyth, Ga., 55 S. E. Rep. 230.

140. NAMES—Idem Sonans.—The names "Morris" and "Maurice" are *idem sonans*.—Thompson v. State, Tex., 97 S. W. Rep. 816.

141. OBSCENITY—Indictment.—It is not necessary in an indictment for using obscene language in the presence of a female, to charge that the language was used of or to another.—Kelly v. State, Ga., 55 S. E. Rep. 482.

142. OFFICERS—Effect of Arrest for Felony.—Where a constable was arrested for a felony, but was subsequently released without hearing, neither his arrest nor incarceration operated as a disqualification creating a vacancy in his office.—Bergerow v. Parker, Cal., 87 Pac. Rep. 248.

143. PLEADING—Allegation of Facts.—A complaint in an action against abstractors for furnishing a defective abstract held, as against a general demurrer, to sufficiently allege ultimate facts, and not conclusions of law.—Hirshiser v. Ward, Nev., 87 Pac. Rep. 171.

144. POWERS—Revocation.—Where title to land is conveyed to secure a debt, and the instrument is not merely a mortgage, a power of sale for failure to make payment is a power coupled with an interest, and is not revoked by the death of the debtor.—Baggett v. Edwards, Ga., 55 S. E. Rep. 250.

145. PROCESS—Affidavit for Publication of Process.—An affidavit for publication of process which is not merely informal, but which fails to state some of the facts essential by statute, will not authorize service by publication.—Johnson v. Hunter, U. S. C. C. of App., Eighth Circuit, 147 Fed. Rep. 133.

146. PROPERTY—Sale of Growing Trees.—Where growing timber is sold without a contract for its immediate severance, it does not become personalty.—Bell County Land & Coal Co. v. Moss, Ky., 97 S. W. Rep. 354.

147. QUIETING TITLE—Persons Entitled to Relief.—A purchaser from a mortgagor not a party to subsequent foreclosure proceedings cannot sue to quiet title against the mortgagee without offering to pay the debt, though barred by limitations.—Burns v. Hiatt, Cal., 87 Pac. Rep. 196.

148. QUIETING TITLE—Pleading.—A bill which attacks a decree rendered in another suit as a cloud on title which does not allege that the decree was obtained by fraud so as to give jurisdiction in equity, or that complainant's title was equitable, or the lands were wild and uncultivated, or that he was in possession, shows no grounds for equitable relief.—Ropes v. Goldman, Fla., 42 So. Rep. 322.

149. REMOVAL OF CAUSES—Separable Controversy—The question whether a suit involves a separable controversy which renders it removable by one or two

more defendants must be determined from the pleadings as they stood when the petition for removal was filed.—City of Cleveland v. Cleveland, C., C. & St. L. Ry. Co., U. S. C. C. of App., Sixth Circuit, 147 Fed. Rep. 171.

150. RAILROADS—Ice on Platform.—A railroad company is not necessarily negligent because there is ice on its platform.—Fitch v. Central R. Co., N. J., 64 Atl. Rep. 992.

151. RAILROADS—Injury to Person at Crossing.—The violation by a railroad company of an ordinance regulating the speed of trains is not conclusive evidence of negligence, but, in an action for an injury at a crossing, is to be submitted to the jury as a circumstance from which negligence may be inferred.—Erie R. Co. v. Farrell, U. S. C. C. of App., Second Circuit, 147 Fed. Rep. 220.

152. RAILROADS — Operation and Maintenance.—Operation of spur track by a railroad outside its right of way, endangering adjoining owners and their property, held a nuisance for which the railroad company was liable.—Thomason v. Seaboard Air Line Ry., N. Car., 55 S. E. Rep. 198.

153. SALES—Delivery.—Where a purchaser did not object because the entire number of cattle was not delivered, he cannot claim on appeal that the seller did not comply with his contract because he did not offer for inspection the entire number he agreed to deliver.—William Hanley Co. v. Combs, Oreg., 87 Pac. Rep. 143.

154. SALES—Measure of Damages for Breach.—Where a vendor fails to deliver goods in accordance with his contract, and they cannot be procured in the market, and the vendee is obliged to procure other goods, the measure of damages is the difference between contract price and the price of the nearest substitute procurable.—Rhind v. Freedley, N. J., 64 Atl. Rep. 963.

155. SALES—Rescission by Seller.—Where a purchaser of cattle was to pass on their quality before accepting, held for the jury whether the purchaser's conduct was an abandonment of the contract, justifying defendant in rescinding.—William Hanley Co. v. Combs, Oreg., 87 Pac. Rep. 143.

156. SHERIFFS AND CONSTABLES—Fees.—A sheriff may retain in excess of his salary the amounts allowed him for his per diem attendance upon the sessions of the circuit and commissioners' courts.—Board of Com'rs of Daviess County v. Fitzgerald, Ind., 79 N. E. Rep. 393.

157. SPECIFIC PERFORMANCE—Damages.—Equity will not retain a bill for specific performance in order to award damages to vendee, if the bill was filed by the vendee when he knew defendant was not the owner of the land in question.—Public Service Corp. v. Hackensack Meadows Co., N. J., 64 Atl. Rep. 976

158. STATES—Actions Against.—Death, pending an appeal of a person given permission by the general assembly, to sue the state, does not cause the suit to abate, but it can be continued to judgment on the representatives of the plaintiff making themselves parties.—Durbridge v. State, La., 42 So. Rep. 387.

159. STATUTES—Directory Provisions.—Where a provision of a statute relates to some immaterial matter, compliance with which is a matter of convenience rather than substance, it will be construed as directory.—Reid v. Southern Development Co., Fla., 42 So. Rep. 206.

160. STREET RAILROADS—Contributory Negligence.—A passenger on a street car held not guilty of negligence *per se* in exposing his elbow to a slight extent from the window of the car, or resting it on the window sill within the car —Smith v. St. Louis Transit Co., Mo., 97 S. W. Rep. 218.

161. STREET RAILROADS—Right of Way.—A street railroad company has no superior and predominant right to the use of the streets of a city on which its tracks are laid over the rights of other users, except the right of way when required.—Indianapolis Traction & Terminal Co. v. Kidd, Ind., 79 N. E. Rep. 347.

162. TAXATION — Assessor's Books.—The omission of words and marks to indicate dollars and cents as the amount of an assessment on the assessor's book, held not to render the assessment void.—Reid v. Southern Development Co., Fla., 42 So. Rep. 206.

163. TAXATION—Corporations.—A corporation held liable to taxation on notes indorsed pursuant to the act of the directors declaring a dividend of notes and cash.—Adams v. Delta & Pine Land Co., Miss., 42 So. Rep. 170.

164. TAXATION—Indian Allotments of Land.—Lands allotted under Indian treaty exempting them from levy, sale or forfeiture until legislature with consent of congress shall remove restriction cannot escape taxation after Indian patentee has become citizen under Act Feb. 1887, ch. 119, 24 Stat. 388, and the 10 years during which congress by Act March 3, 1893, ch. 209, 27 Stat. 612, 633, postponed the operation of the provision of Laws Wash. 1889, 1890, p. 459 have expired.—Goudy v. Meath, U. S. S. C., 27 Sup. Ct. Rep. 48.

165. TAXATION—Whisky in Warehouse.—The statute of Kentucky requiring the proprietor of a warehouse in which bonded whisky is stored, on its removal to pay the annual taxes levied thereon while in storage with interest, is not in violation of the constitution of the United States.—Anderson Co. v. Kentucky Distilleries & Warehouse Co., U. S. C. C., E. D. Ky., 146 Fed. Rep. 999.

166. TRIAL—Objection to Evidence.—It was not error to overrule an objection on the ground that the evidence was illegal, which went to the whole of the evidence and did not point out the inadmissible portion.—Martin v. City of Gainsville, Ga., 55 S. E. Rep. 499.

167. TRIAL—Vacation of Verdict.—When a judge sets aside a verdict, he should state in the record whether it is done in the exercise of his discretion or for errors of law.—Jarrett v. High Point Trunk & Bag Co., N. Car., 55 S. E. Rep. 338.

168. TRUSTS—Expenses Chargeable to Income.—Expenses paid out of capital, which should have been paid out of income, which was insufficient for the purpose, should be made good out of income subsequently collected.—*In re* Hurlbut's Estate, 100 N. Y. Supp. 1095.

169. TRUSTS—Pleadings.—The use of the formula barred and foreclosed by and from the equity of redemption in the prayer of a complaint and in a judgment thereon held not to conclusively establish the nature of the action nor impair the validity of the judgment.—Curtin v. Krohn, Cal., 87 Pac. Rep. 243.

170. VENUE—Condition Precedent.—A plaintiff entitled to a jury trial in an action to recover for goods sold cannot be compelled to consent to a reference as a condition of retaining the place of trial in the county wherein he does business.—J. P. Lewis Co. v. Phœnix Car Co., 100 N. Y. Supp. 669.

171. WASTE—Common Law.—Though the English statutes of Marlbridge and Gloucester have no force as statutes in Mississippi, the principal announced by them held a part of the law of the state.—Moss Point Lumber Co. v. Board of Suprs of Harrison County, Miss., 42 So. Rep. 290.

172. WATERS AND WATER COURSES—Accretions.—The water's edge and not the surveyed meander line is the shore line from which lines should be drawn to show the water and accretion rights of adjacent riparian proprietors.—City of Peoria v. Central Nat. Bank, Ill., 79 N. E. Rep. 296.

173. WATERS AND WATER COURSES—Agreement as to Use.—Where the parties mutually agreed on division of water rights, defendant, having been forced to defend his rights, can rely on his original claim of right, and on the right claimed under the agreement.—Bree v. Wheeler, Cal., 87 Pac. Rep. 255.

174. WATERS AND WATER COURSES—Restoration of Channel.—Where a freshet suddenly changes the channel of a river across the land of a riparian proprietor, the latter may restore the flow to its original bed.—Morton v. Oregon Short Line Ry. Co., Oreg., 87 Pac. Rep. 151.

175. WITNESSES—Competency.—In a proceeding to surcharge the account of an executrix with money claimed by her the executrix held incompetent to testify to statements by and transactions with the decedent in support of her claim.—Carlin v. Carlin, N. J., 64 Atl. Rep. 1018